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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 632

BEATRICE ALEXANDER, *et al.*,

Petitioners,

v.

HOLMES COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

MOTION TO ADVANCE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MOTION TO ADVANCE

Petitioners, by their undersigned counsel, move the Court to advance consideration and disposition of this case, and in support thereof would show that this case presents an issue of national importance requiring prompt resolution by this Court, for the reasons stated in the annexed petition for writ of certiorari.

WHEREFORE, petitioners pray that the Court: 1) consider this motion in vacation; 2) shorten the time for filing respondents' response to 15 days; 3) consider the petition during the conference week of October 6, 1969, or as soon thereafter as possible; and 4) grant certiorari and summarily reverse the judgment below or set an expedited brief-

ing schedule and advance the case on the calendar for argument.

Respectfully submitted,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered August 28, 1969, amending its order of July 3, 1969, as modified July 25, 1969.

Opinions Below

The order of the United States Court of Appeals for the Fifth Circuit of which review is sought is unreported and is set forth in Appendix E. Earlier opinions of the Court of Appeals and of the United States District Court for the Southern District of Mississippi are unreported and are set forth in Appendices A through D.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered August 28, 1969 (Appendix E, p. 71a, *infra*).

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) to review the Court of Appeals' order delaying the implementation of school desegregation plans in 14 school districts in Mississippi.

Question Presented

Did the Court of Appeals err in granting 14 Mississippi school districts an indefinite delay in implementing school desegregation plans based upon generalized representations by the United States Department of Health, Education and Welfare that delay was necessary for preparation of the communities?

Constitutional Provision Involved

This case involves the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement

These cases[1] test how much longer Negro schoolchildren in 14 substantially segregated school districts in Mississippi

[1] These cases were filed in the United States District Court for the Southern District of Mississippi between the years 1963 and 1967. Jurisdiction was predicated upon 28 U.S.C. §1343(3) and 42 U.S.C. §§1981, 1983 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plaintiffs in school desegregation cases in Mississippi often sue several school boards located within the same geographical area under one civil action number;

will have to wait to exercise their right to a desegregated education decreed by this Court more than 15 years ago in *Brown* v. *Board of Education*.[2]

For 10 years after *Brown* v. *Board of Education*, the public schools of Mississippi remained totally segregated. Thereafter, the school boards involved in this litigation adopted freedom of choice plans indistinguishable from that condemned last year by this Court in *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968). These freedom of choice plans did not work to disestablish the dual school system. Indeed, the token results achieved

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the nine cases brought here by this petition involve fourteen separate school districts.

First, there are three cases wherein suit was brought by Negro schoolchildren against six separate school districts: *Harris* v. *Yazoo County Board of Education, Yazoo City Board of Education* and *Holly Bluff Line Consolidated School District; Alexander* v. *Holmes County Board of Education; Killingsworth* v. *The Enterprise Consolidated School District* and *Quitman Consolidated School District.*

Second, there are four cases wherein suit was brought by Negro schoolchildren against six school districts and the United States subsequently intervened: *Hudson and United States* v. *Leake County School Board; Blackwell and United States* v. *Issequena County Board of Education* and *Anguilla Line Consolidated School District; Anderson and United States* v. *Canton Municipal Separate School District* and *Madison County School District; Barnhardt and United States* v. *Meridian Separate School District.*

Third, there are two cases which were filed by the United States wherein Negro schoolchildren subsequently intervened: *United States and George Williams* v. *Wilkinson County Board of Education; United States and George Magee, Jr.* v. *North Pike County Consolidated School District.*

This petition formally embraces only school desegregation suits involving private plaintiffs. But the disposition of this petition will govern an additional 16 suits involving 19 school districts against whom the United States is the sole plaintiff in companion cases below.

[2] 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955) (*Brown II*).

by these plans were even less than the results held insufficient in *Green*.[3]

In July, 1968, petitioners moved the district court to require each respondent school board to adopt a new desegregation plan which "promises realistically to work, and promises realistically to work *now*" (*Green, supra*, 391 U.S. at 439 (1968) (emphasis Court's)). The district court refused to schedule an early hearing on petitioners' motions, thus allowing the defective freedom of choice plans to be employed during the 1968-69 school year. Accordingly, petitioners moved the Court of Appeals for summary reversal of the district court's refusal to grant relief for the 1968-69 school year. The Court of Appeals denied summary re-

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[3] The extent of student desegregation in the school districts at bar is shown in the following table:

District	*Percentage of Negroes in All-Negro Schools*		*Percentage of Negroes in Predominantly White Schools*	
	*1968-69**	*1969-70** (Projected)*	*1968-69**	*1969-70** (Projected)*
Anguilla	94.4%	96.1%	5.6%	3.9%
Canton	99.5%	99.9%	0.5%	0.1%
Enterprise	84%		16%	
Holly Bluff		98.9%		1.1%
Holmes County		95.5%		4.5%
Leake County	97.1%	95.7%	2.9%	4.3%
Madison County	99.1%	99.1%	0.9%	0.9%
Meridian	91.4%	84.8%	8.6%	15.2%
North Pike County	99.2%	99.7%	0.8%	0.3%
Quitman		96.1%		3.9%
Sharkey-Issaquena	94.6%	93.6%	5.4%	6.4%
Wilkinson County	98.1%	97.3%	1.9%	2.7%
Yazoo		91.2%		8.8%
Yazoo County		93.3%		6.7%

* These figures are based upon the school districts' reports to the district court.

** The projections are based for the most part upon the freedom of choice forms completed during the Spring of 1969, as compiled by the United States and submitted to the Court of Appeals.

versal, but ordered the district court to conduct hearings no later than November 4, 1969. *Adams* v. *Mathews*, 403 F.2d 181 (5th Cir. 1968). Upon remand, the district court consolidated these school desegregation cases brought by the Negro plaintiffs with those brought by the United States and conducted hearings *en banc* during October and December, 1968.[4]

At the October hearings, the respondent school boards presented lengthy testimony to the effect that achievement test results justified the continued use of free choice assignments and the concomitant token integration of white schools and perpetuation of all-Negro schools.[5] Indeed, the cases were consolidated principally to permit the school boards to join in this "expert" testimony. The respondent school boards also resisted any alteration of the free choice plans on the ground that more than token integration would be followed by withdrawal of white children from the public schools and the proliferation of private schools.[6]

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[4] The consolidated cases proceeded under the caption *United States* v. *Hinds County Board of Education* and *Alexander* v. *Holmes County Board of Education*. They embraced 19 districts against whom the United States was the sole plaintiff, plus the 14 districts at bar. See note 1, *supra*.

[5] This position was urged by Mississippi school districts and white parent intervenors in 1964 to retain totally segregated schools. Voluminous expert testimony was presented and the district court entered findings of fact supporting the proposition that Negroes were innately inferior; but the district court felt bound by Court of Appeals' rulings to deny defendants' request that *Brown* v. *Board of Education* be overruled. The defendants appealed and the Court of Appeals ordered an end to such efforts to justify segregation. *Jackson Municipal Separate School Districts* v. *Evers; Biloxi Municipal Separate School District* v. *Mason;* and *Leake County School Board* v. *Hudson*, 357 F.2d 653 (5th Cir. 1966). The last case cited, *Hudson*, is the same case before the Court in this petition.

[6] Mississippi's first effort to retain segregated schools through tuition grant legislation was held unconstitutional on the ground that the legislation's purpose and effect was to perpetuate segrega-

Nine months after the Court of Appeals' admonition to the district court to treat the cases "as entitled to the highest priority" (403 F.2d at 188), the district court, on May 13, 1969, approved freedom of choice plans for all the respondent school districts.[7]

On June 7, 1969, the United States filed alternative motions for summary reversal or expedited consideration of the cases. On June 25, 1969, the Court of Appeals entered a letter directive expediting consideration of the cases. See Appendix B, p. 24a, *infra*.

On July 3, 1969, the Court of Appeals reversed the district court and directed it to require from the school boards plans of desegregation other than freedom of choice. See Appendix B, pp. 28a-37a, *infra*. The Court found:

(a) that not a single white child attended a Negro school in any of the districts;

(b) that the percentage of Negro children attending white schools ranged from zero to 16 per cent;

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tion. *Coffey* v. *State Educational Finance Commission*, 296 F. Supp. 1389 (S.D. Miss., 1969) (3-judge court).

The Mississippi legislature recently enacted a new tuition grant program, in the nature of student loans, to enable white students to attend private schools (House Bill No. 67). Also passed by the House of Representatives (under consideration by the Senate) is a bill which would grant up to $500. in credits toward Mississippi income taxes for all payments or donations to schools, "public or private."

[7] The opinion and orders of the district court are set forth in Appendix A. The order in *Alexander* v. *Holmes County Board of Education* is set forth at p. 20a, *infra* and is representative of the orders entered in eight of these nine cases. The ninth order, entered in *Killingsworth* v. *Enterprise Consolidated School District* is set forth at p. 21a, *infra*. It differed from the others in that it dismissed the petitioners' motion on the ground, later held erroneous by the Court of Appeals, that the petitioners had not explicitly authorized their attorney to file the motion.

(c) that token faculty integration continued in force; and,

(d) that school activities continued substantially segregated.

Quoting *Adams* v. *Mathews, supra,* the Court held that "as a matter of law, the existing plan fails to meet constitutional standards as established in *Green*" (Appendix B, p. 32a, *infra*). The Court of Appeals directed that the respondent school boards be required to collaborate with the United States Office of Education in formulating new desegregation plans effective for the 1969-70 school year[8] (Appendix B, pp. 35a-36a, *infra*). A precise timetable for the submission and implementation of the plans was established to protect petitioners' right to relief effective for the 1969-70 school year (Appendix B, pp. 36a-37a, *infra*). The Court directed that the mandate be issued forthwith (Appendix B, p. 37a, *infra*).[9]

On August 11, 1969, the deadline established for submission of the new desegregation plans, the Office of Education submitted terminal plans of desegregation for the 33 school districts to the district court. Thirty of the 33 plans provided for implemenation of pairing and/or zoning plans of desegregation to be effective with the commencement of the 1969-70 school year.[10] In his transmittal letter of August 11 (See Appendix C, pp. 40a-52a), Dr. Gregory Anrig, Director of the Equal Educational Opportunities Division

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[8] This had been consistent practice following *Hall* v. *St. Helena Parish School Board,* No. 26450 (5th Cir., May 28, 1969).

[9] On July 25, 1969, the Court of Appeals modified its order in respects not important here (Appendix B, p. 38a, *infra*).

[10] The exceptions were for Hinds County, Holmes County and Meridian, in which it was asserted that problems peculiar to those districts required postponing full implementation until the beginning of the 1970-71 school year.

of the Office of Education—the educational expert responsible for the final review of the plans—stated to the district court (Appendix C, p. 44a, *infra*):

> I believe that each of the enclosed plans is educationally and administratively sound, both in terms of substance and in terms of timing. In the cases of Hinds County, Holmes County and Meridian, the plans that we recommend provide for full implementation with the beginning of the 1970-71 school year. The principal reasons for this delay are construction, and the numbers of pupils and schools involved. In all other cases, the plans that we have prepared and that we recommend to the Court provide for complete disestablishment of the dual school system at the beginning of the 1969-70 school year.

On August 19, 1969, the Secretary of the Department of Health, Education and Welfare sent a letter to the Chief Judge of the Court of Appeals and the judges of the district court requesting that the plans submitted by the Office of Education be withdrawn and that the 1969-70 deadline for implementation of plans be rescinded (Appendix C, pp. 53a-54a, *infra*). The Secretary did not dispute Dr. Anrig's view that the plans were "educationally and administratively sound." Instead, the Secretary noted that he had reviewed these plans "as the Cabinet officer of our Government charged with the ultimate responsibility for the education of the people of our Nation" (Appendix C, p. 52a, *infra*). He continued (Appendix C, p. 54a, *infra*):

> In this same capacity, and bearing in mind the great trust reposed in me, together with the ultimate responsibility for the education of the people of our Nation, I am gravely concerned that the time allowed

> for the development of these terminal plans has been much too short for the educators of the Office of Education to develop terminal plans which can be implemented this year. The administrative and logistical difficulties which must be encountered and met in the terribly short space of time remaining must surely in my judgment produce chaos, confusion, and a catastrophic educational setback to the 135,700 children, black and white alike, who must look to the 222 schools of these 33 Mississippi districts for their only available educational opportunity.

The Secretary requested that the Office of Education and the respondent school boards be given until December 1, 1969 to formulate new plans for desegregation, with implementation of those plans to be left to an unspecified future time (Appendix C, p. 52a, *infra*).

The next day, August 20, 1969, the Court of Appeals entered an order acknowledging receipt of the Secretary's letter (Appendix C, p. 55a, *infra*). The next day, the Department of Justice filed a motion in the Court of Appeals requesting modification of the Court's order of July 3, 1969, based upon the Secretary's letter, and petitioners filed their opposition thereto. The next day, the Court of Appeals orally granted leave to the district court "to receive, consider and hear the Government's motion for extension of time until December 1, 1969" (see order of the Court of Appeals of August 28, 1969, Appendix E, p. 75a, *infra*). On August 25, 1969, the district court held a hearing on the Government's request.

At the hearing, the Government presented two witnesses employed by the Office of Education, who testified that the desegregation plans were educationally sound, but that implementation of them should be delayed due to adminis-

trative difficulties, generally stated, in implementing the plans' provisions—difficulties which the school boards had made no attempt to solve in the fifteen years since *Brown*. In opposition, petitioners presented the testimony of an expert witness who testified that there were no sound educational reasons for delay and that the reasons given by the Government's witnesses were generalities unrelated to a single specific situation in any of the school districts involved.

The next day, the district court entered its findings of fact and conclusions of law (see Appendix D, pp. 56a-70a, *infra*), which, together with the transcript of the hearing, were transmitted to the Court of Appeals. Two days later, on August 28, 1969, the Court of Appeals entered an order granting the government's request for delay (see Appendix E, pp. 71a-78a, *infra*).

On August 30, 1969, petitioners applied to Mr. Justice Black for an order vacating the Court of Appeals' suspension of its July 3rd order. On September 5, 1969, Mr. Justice Black denied the application, but stated that his disposition did not "comport with my ideas of what ought to be done in this case when it comes before the entire Court. I hope these applicants will present the issue to the full Court at the earliest possible opportunity" (Appendix F, p. 83a, *infra*).

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted to Review and Reverse the Court of Appeals' Delay of Desegregation Because the Time for Delay Has Run Out.

These cases test whether Negro schoolchildren in 14 substantially segregated school districts in Mississippi are—15 years after *Brown* v. *Board of Education*—at last "entitled to have their constitutional rights vindicated now without postponement for any reason" (Opinion in Chambers of Mr. Justice Black, Appendix F, p. 81a, *infra*).

When, 14 years ago, this Court declared that segregated schools would be disestablished not immediately but only "with all deliberate speed," it made a unique departure from the principle that "[t]he basic guarantees of our Constitution are warrants for the here and now" (*Watson* v. *Memphis*, 373 U.S. 526, 533 (1963)).[11] But it did so upon the explicit condition that school boards establish "that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date" (*Brown II*, 349 U.S. at 300). This Court could hardly have envisioned the extent to which that narrowly circumscribed period of grace would be exploited by local school boards and state officials. In Mississippi, a school generation of youngsters passed through the segregated system while school boards showed not the slightest interest in "good faith compliance at the earliest practicable date."

Although Mississippi state officials initially experimented with open defiance, see *United States* v. *Barnett*, 330 F.2d

[11] "[P]robably for the one and only time in American constitutional history, a citizen—indeed a large group of citizens—was compelled to postpone the day of effective enjoyment of a constitutional right" (*Price* v. *Denison Independent School District Board of Education*, 348 F.2d 1010, 1013 (5th Cir. 1965)).

369 (5th Cir. 1963), they soon learned to rely upon less obvious—and sometimes ingenious—devices for delay.

A pupil placement law was passed, which established a labyrinth of administrative procedures to ensnare those Negro students hardy enough to attempt to desegregate white schools. For a season that worked. The first public school desegregation suits brought in federal court in Mississippi were dismissed for failure to exhaust administrative remedies under the Pupil Placement Law. So it was that while this Court, in 1964, was holding that "the time for mere 'deliberate speed' has run out" (*Griffin* v. *School Board*, 377 U.S. 218, 234 (1964), not a single child in Mississippi attended an integrated school.

That year, the Court of Appeals reversed the district court's dismissal of the first school desegregation suits. *Evers* v. *Jackson Municipal Separate School District*, 328 F.2d 408 (5th Cir. 1964). Upon remand, the school boards and white intervenors delayed the trials with voluminous testimony as to the innate inferiority of Negroes as a rational basis for continued segregation. The district court, after further delay, entered findings of fact supporting the defendants' theories of racial superiority, but held that it was compelled by the Court of Appeals to require a grade-a-year plan—thus seeking to insure that the time for "deliberate speed" would run until 1976. That decision was overturned in *Singleton* v. *Jackson Municipal Separate School District*, 348 F.2d 729 (5th Cir. 1965) (injunction pending appeal); 355 F.2d 865 (5th Cir. 1966).

The Civil Rights Act of 1964 promised a new era in school desegregation, through a "national effort, bringing together Congress, the executive, and the judiciary [which]

may be able to make meaningful the right of Negro children to equal educational opportunities." [12]

Under Title VI of the Act, the Department of Health, Education and Welfare fixed minimum standards to be used in determining the qualifications for schools applying for federal financial aid. This administrative enforcement by H.E.W. produced a dramatic increase in the level of desegregation in the South. See United States Commission on Civil Rights, *Federal Enforcement of School Desegregation*, p. 31 (September 11, 1969). The courts accorded "great weight" to those minimum standards and established "a close correlation . . . between the judiciary's standards in enforcing the national policy requiring desegregation of public schools and the executive department's standards in administering this policy" (*Singleton*, *supra*, 348 F.2d at 731).

By 1969, the united action of the courts and the executive in advancing toward their common objective of school desegregation nourished hopes that the end of the desegregation process was in sight. To be sure, progress under Mississippi's freedom of choice plans continued to be minimal. See note 3, *supra*. But following this Court's decision in *Green*, numerous decisions of the Court of Appeals set the constitutional deadline for compliance at the 1969-70 school year. See *Adams v. Matheus*, *supra*; *United States v. Greenwood Municipal Separate School District*, 406 F.2d 1086 (5th Cir. 1969); *Henry v. Clarksdale Municipal Separate School District*, 409 F.2d 682 (5th Cir. 1969); *United States v. Indianola Municipal Separate School District*, 410 F.2d 626 (5th Cir. 1969). And the executive also directed its efforts toward full compliance.

[12] *United States v. Jefferson County Board of Education*, 372 F.2d 836, 847 (5th Cir. 1966), affirmed *en banc* 380 F.2d 385 (5th Cir. 1967), cert. denied 389 U.S. 840 (1967). Emphasis Court's

during the 1969-70 school year. As late as July 3, 1969, in a joint statement by the Attorney General and the Secretary of the Department of Health, Education and Welfare, the executive announced that "the 'terminal date' must be the 1969-70 school year." Only a narrowly circumscribed exception was to be permitted:

> Additional time will be allowed only where those requesting it sustain the heavy factual burden of proving that compliance with the 1969-70 time schedule cannot be achieved; where additional time is allowed, it will be the minimum shown to be necessary.[13]

In this context of a united judicial and executive front against the crumbling barriers of school desegregation, the Court of Appeals entered its orders of July 3rd and 25th enforcing the 1969-70 "terminal date." See Appendix B, *infra*.

Then, on August 19, 1969, there occurred "a major retreat in the struggle to achieve meaningful school desegregation" (Statement of the United States Commission on Civil Rights, p. 2, September 11, 1969). H.E.W. essayed an initiative for delay, based upon nothing more than a generalized reference to "administrative and logistical difficulties" and speculation that enforcement of the 1969-70 "terminal date" would result in "chaos [and] confusion" (Letter of August 19, 1969 from the Secretary of the Department of Health, Education and Welfare to the Chief Judge of the Court of Appeals, Appendix C, p. 54a, *infra*). The delay requested called for a new deadline of December 1, 1969 for the school districts to formulate plans, *with implementation to be accomplished at some unspecified future time.*

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[13] The statement is set forth in *Federal Enforcement of School Desegregation, supra*, Appendix C.

In support of this initiative for delay, no attempt was made to meet the "heavy factual burden" which had earlier been demanded of school boards seeking delay. Without particularized reference to the conditions in individual school districts, a blanket assessment was made that more time was needed in the 33 school districts. No effort was made to show that the delay sought was "the minimum shown to be necessary" for each of the districts.

The Court of Appeals' order of August 28, 1969 accepted H.E.W.'s new open-ended timetable. It did so without explanation or elaboration, indicating it felt it had no choice but to acquiesce. (see Appendix E, *infra*).

The Solicitor General recognized that HEW's action and the Court of Appeals' acquiescence meant that yet another segregated school year would probably pass into history. He characterized this as "a tragedy and a default" (Memorandum for the United States, p. 5). But nothing, he said, could be done.

Petitioners disagree. This initiative for delay, based upon nothing more than undifferentiated apprehension that further "preparation of the community" [14] is required, can and should be corrected, for it raises a threat to school desegregation of profound national importance, for two reasons.

First, if the ingenuity of the federal government is to be applied to the task of fashioning excuses for delay, it can hardly fail to inspire local school boards to do the same. Administrative enforcement under Title VI will be crippled as recalcitrant school boards press for further relaxation of enforcement and those boards that reluctantly did comply begin to feel they acted in haste. Dissident segregationist groups will feel good reason to redouble

[14] Memorandum for the United States, p. 4

their pressures on school officials who kept their pledge to the Constitution in the face of opposition.

Second, judicial enforcement will be undermined if the federal courts are deprived of the kind of effective assistance upon which they had rightly come to rely. As Chief Judge Brown observed in *Price, supra*, executive cooperation had taken the federal judge out of the role of school administrator—a role "for which he was not equipped" (348 F.2d at 1013). In this context, then, it is perhaps not surprising that the court below acquiesced in H.E.W.'s request for delay, without comment or explanation. It was in no position to analyze whether the delay requested for each of the 33 school districts was "the minimum shown to be necessary." Only if it had held that there was no longer "a 'transition period' during which federal courts would continue to supervise the passage of the Southern schools from dual to unitary systems" (Opinion in Chambers of Mr. Justice Black, Appendix F, p. 81a, *infra*), could it have freed itself from the difficult, if not impossible, position into which it was thrust. But the court below may have felt as did Mr. Justice Black, that this decision must come from this Court.

In *Brown II*, this Court held that school boards which made a "prompt and reasonable start toward full compliance" might be granted "additional time" to solve administrative problems (349 U.S. at 300). The problems this Court foresaw concerned (349 U.S. at 300-01):

(1) "Physical condition of the school plant";

(2) "School transportation system";

(3) "Personnel"; and,

(4) "Revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis."

After 15 years, plans calling for the revision of school districts and attendance areas into compact units to achieve a unitary system were finally submitted. But the other problems had not yet been solved by the school districts at bar, found the district court. It found a present need for (Appendix D, p. 65a, *infra*):

> (1) "Building renovations, including the adjusting of laboratories and like facilities";
>
> (2) "Bus routes [to] be redrawn"; and,
>
> (3) "Faculty and student preparation, including various meetings and discussions of the problems to be presented and the solutions therefor."

Petitioners do not doubt that in some districts there remain obstacles to the "workable, smooth desegregation which is desired" (*Ibid*). But why? "There can be little doubt where the basic fault lies in this matter. The reason why the plans are so difficult to formulate and to implement is largely because the local school boards involved in this case have generally done nothing but resist; they have continuously failed and refused to develop plans for the effective desegregation of their schools, so as to eliminate the long-established dual school system." (Memorandum for the United States, p. 4).

More delay might make for smoother desegregation. But experience does not favor that prediction. Delays in the past have served to embolden the recalcitrant, discourage voluntary compliance and nourish new schemes for evasion. Fifteen years of history teach us that every possibility for delay, however circumscribed, will be treated as an invitation for ready ingenuity to exploit. Moreover, as any school administrator will testify, there will always be administrative problems in the operation of a school district. The

constitutional goal is not the smoothest possible desegregation; it is the realization of personal and present rights[15] against which, at this late date, administrative convenience amounts to nothing.[16]

But petitioners see no need to indulge in speculation when a sharper answer is called for: these school districts have had 15 years to eliminate barriers to desegregation and that is enough. If the desegregation process is ever to be successfully concluded, this Court must act. The question is one of constitutional rights and that is a question which under our system can only be finally resolved by this Court. This Court should grant review and hold, with Mr. Justice Black, "that there is no longer the slightest excuse, reason, or justification for further postponement of the time when every public school system in the United States will be a unitary one" (Opinion in Chambers of Mr. Justice Black, Appendix F, p. 81a, *infra*).

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[15] *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 351-2 (1938).

[16] The Court of Appeals has held in this and other cases that interruption of the school year will be no bar to implementation of desegregation plans. See Appendix B, p. 37a, *infra; United States* v. *Jefferson County Board of Education*, 5th Cir., No. 27444, June 26, 1969.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the District Court Approving Freedom of Choice Plans

[Caption omitted]

These twenty-five school cases involving thirty-three school systems are before the Court on motions of the plaintiffs to update the *Jefferson* decree in all of these cases to comport with the requirements of *Green*.[1] The *Jefferson* decree is sometimes referred to as the model decree for the establishment of a unitary school system as such plan was designed and approved by the United States Court of Appeals for the Fifth Circuit en banc.[2] The right of these movants under existing circumstances to institute and maintain this proceeding is challenged in limine. The challenge questions the right of these plaintiffs to institute this proceeding for supplemental relief in these cases where no child or parent admittedly has complained of any discriminatory treatment by the school. In some of these cases, a final judgment was entered and it is contended that such judgments cannot be reopened for the purpose of enlarging and expanding the relief granted in the original judgment. Under Civil Rule 65(d), an injunction must be specific to be enforced. But no additional relief is sought. These plaintiffs seek not to expand or enlarge upon the relief previously granted, but simply seek to require these schools to adopt and apply a plan

[1] *Charles C. Green, et al.* v. *County School Board of New Kent County, Virginia, et al.*, 391 U.S. 430, 88 St.Ct. 1689.

[2] *United States* v. *Jefferson County Board of Education*, (5 C.A.) (1966) 372 F.2d 836, affirmed on rehearing en banc 380 F.2d 385, certiorari denied.

which will accomplish the purpose enjoined by the model decree. There is no merit in either of these motions for the reason indicated; and for the further reason that the Supreme Court of the United States has enjoined upon the United States District Courts the duty to keep these school cases open, and to supervise them to the end that ultimately the principles in *Brown* (and allied school cases) are made to effectively operate so that no child in any public school is in any manner denied any equal protection right by any school. Those motions of the defendants to dismiss these motions for that reason will be denied.

The Enterprise and Quitman schools in Civil Action No. 1392(E), supra, move the Court to dismiss the motion in that case because of the lack of authority of the attorney to have filed it. The Court heard testimony on this question and finds as a fact that the attorney who filed such motion never represented the plaintiffs in that case and that he had no express or implied power or authority to have filed such motion here. The facts and circumstances therein will be set forth in detail in the accompanying footnote.[1]

---

[1] *Charles C. Green, et al. v. County School Board of New Kent County, Virginia, et al.*, 391 U.S. 430, 88 S.Ct. 1689; *Arthur Lee Raney, et al. v. Board of Education of Gould School District*, 391 U.S. 443, 88 S.Ct. 1697; *Brenda K. Monroe, et al. v. Board of Commissioners of City of Jackson, Tennessee*, 391 U.S. 450, 88 S.Ct. 1700.

[1] This matter is before the Court on motion of the defendants to dismiss the motion of the *attorney* for supplemental relief. The facts show and the Court finds: That the attorney who filed the motion for supplemental relief was not one of the attorneys who initially instituted the suit, that original local counsel resigned as attorney and withdrew from the case with approval of the Court, that present counsel seeking such relief graduated from law school two or three years ago and that he does not know any of the plaintiffs and was never requested by any plaintiff (parent or child of this school) to seek any supplemental relief; that no

Opinion of the District Court Approving Freedom of Choice Plans

That motion of the defendants in said Civil Action No. 1302(E), supra, will be sustained.

Most of the schools in these cases when judged by their statistics plainly do not present any impressive accomplishment or measure up to the minimum requirements of *Green* in the disestablishment of every vestige of desegregation under the old system. Most of the schools in these cases still can be recognized and operate as schools clearly identifiable by race. The facts and underlying circumstances in these cases unmistakably show that very little progress has been made in desegregating these schools, except in a very few instances. It is incumbent upon the plaintiffs in these cases to show a lack of substantial progress toward the disestablishment of a dual school system and the establishment of a unitary school system of both races. If there

parent, or child communicated with counsel and advised him of any discrimination or unsatisfactory compliance by either school in its progress toward complying with the requirements of the model decree and the Court thus finds from such undisputed testimony and reasonable inferences deducible from it that counsel who signed the motion in this case for supplemental relief had no express or implied authority from any plaintiff or parent or child from either school to do so; that no parent or child from either school appeared at the hearing and no representative of any parent or any child from either school appeared at the trial during the two weeks while these school cases were being heard to testify that anybody connected with either of said schools had authorized present counsel to seek such supplemental relief and the Court finds that present counsel Anderson had no such power or authority, express or implied, and that defendants motion to dismiss his application for such relief as being unauthorized will be granted. This suit was initially instituted by non-resident counsel who never appeared in the case, and local counsel who withdrew from the case prior to the hearing so that only Reuben V. Anderson a young Jackson lawyer appeared as attorney for this motion and sought by his own testimony to establish his right to do so but entirely without factual support or justification therefor.

upon devolves upon the defendants to explain or overcome such showing by the plaintiffs. The rule is that the burden of proof always rests upon the plaintiff (or movant) who must establish proof of his claim. When the plaintiff makes out a prima facie case, then the *burden of evidence* devolves upon the defendant to explain, or justify the facts and circumstances surrounding his position, but the burden of proof never shifts from the plaintiff.

There are many variable conditions which exist in these twenty-five defendants' cases that require some special and separate consideration and treatment. In some of these schools such as the Noxubee County School District, Civil Action No. 1372(E), there are from three to four colored students to each white student in these schools. A forced mixing of these schools by a mathematical formula of indiscriminate mixing would result in the creation of all Negro schools. All of these schools complain of the provision in the model decree which denies the school authorities the right to persuade parents and children to transfer to schools of the opposite race.[1] The facts in this case show that all of these schools have very faithfully obeyed that injunction of the Court. No school board member or teacher or representative of any school has tried to influence any child or any parent to send any child to any school predominantly of the opposite race. But it is the oft repeated law in this Circuit that the school board (and nobody else) has the nondelegable duty to adopt a plan which will con-

[1] That provision appears in paragraph II(c) of the *Jefferson* decree and provides: "At no time shall any *official, teacher or employee* of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor, or penalize any person because of the choice made."

form to all of the requirements of the model decree and to see that such plan works. Every school official who testified in every one of these cases before the Court testified convincingly before this Court that this provision of this model decree had interfered with a fair and just and proper operation of the freedom of choice plan in these schools. Yet, like Prometheus (chained to a rock) these schools are ordered by the Court to shoulder this very positive and important duty of desegregating these schools while the Court denies them the right to counsel with and persuade parents to let their children enter a school predominantly of the opposite race. This Circuit has steadfastly refused to modify that provision in the model decree in any manner, or to any extent and considers such provision as an important matter of policy to be changed only by the United States Court of Appeals for this Circuit sitting en banc. This Court is unable to assay the degree to which such provision in the injunction of this Court has contributed to the failure of these schools to accomplish more impressive results than are revealed by the bare figure statistics as to mixing of the races in these schools. Certainly, these statistics cannot be ignored or disregarded and are well calculated to have an impressive effect upon any trier of facts in search of some means for determining whether or not the freedom of choice plan has worked. But there is nothing in *Green*, or its two companion cases, to indicate that statistics alone are to determine whether or not a plan works. Otherwise, a mathematical formula would have been prescribed by the Court and sound judicial discretion of this Court would have been discarded. But, instead, *Green* said: "We do not hold that 'freedom of choice' can have no place in such a plan." * * * "Although the general ex-

perience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, non-racial system there might be no objection to allowing such a device to prove itself in operation." The facts and circumstances in practically all of these cases (with a very few exceptions) show this Court to its entire satisfaction that these schools, operating under the freedom of choice plan, have operated in the very best of good faith with the Court in an honest effort to comply with and conform to all of the requirements of the model decree. In these cases so much progress has been made in the attitude and cooperation of the parents, children and teachers that they are entitled to much credit and commendation of the Court as good citizens who wish to comply with all of the requirements of the law, and to lay aside any inbred and ingrained former adverse opinions about the operation of a unitary school system.

This Court has long entertained and often expressed the view that the freedom of choice plan would not work effectively, so long as mere lip service was paid the plan by the school authorities, when the facts and circumstances would disclose that actually the parent and the child in some of these schools would not in truth and in fact be a free agent as to the school to be attended by the colored child. But a very careful examination of the witnesses and analysis of their testimony in these cases revealed to the Court not one instance where any colored parent, or colored child did not do exactly what they wanted to do in deciding as to the school which the colored child would

attend. There are many reasons (*and very important reasons*) why colored children have not sought to attend formerly all-white schools. The primary reason is that the vast majority of all schools attended by colored children qualify for the government subsidiary as "target schools." They are provided by the government with free lunches, and even improved facilities and working tools in their shops, because the majority of the parents in such schools are in low income brackets. A disruption of those benefits would be disastrous to those children who would be obliged to leave school and lose all educational advantages now available to them there. It is such facts and circumstances which have caused the courts to wisely observe, time and again, that there is no easy and quick and ready-made cure for the past ills of state enforced segregation. The problem and its cure must yield to the facts and circumstances in each particular school case. The cure must not result in a destruction of the wholesome objective of the plan. It is a sorry and very strange principle of constitutional law which would foster by its application a catastrophic destruction of the right sought to be protected and enjoyed.

Well trained colored teachers in active service in formerly colored schools and in formerly white schools in this district have appeared before this Court and convincingly testified under oath as a matter of fact that freedom of choice was actually working in their schools; that perfect harmony and understanding existed in the school and that no danger to the school system lurked in the implementation of the freedom of choice plan, but that any kind of forced mixing of the races against the wishes of the involved parents and children (colored and white) would result in an absolute and complete destruction of the school

and its system. That is likewise a fair analysis and characterization of the uncontradicted testimony of experienced expert witnesses who have spent their lives in school service in many other states. This testimony does not show that desegregation is unpopular with some parents and some children, but does positively show that any rushed and random forced mixing applied for the sake of immediate mathematical statistics would literally destroy the school system for both races. In many instances where the ratio of colored people to white people is very high, the result would be not to create just schools, but to create predominantly colored schools, readily identifiable as such in every instance. The same corresponding result would follow in areas where the white population is very dense and few Negroes live.

Surely, the policy and practice burden of these schools is not on the parents and children to provide a unitary school system, but is squarely upon the shoulder of these school boards. But what can a school board member do who is enjoined under penalty of contempt by the *Jefferson* decree not to try to persuade, or dissuade any child, or any parent as to the school which the child will attend? That *Jefferson* decree has not been amended and suggestion as to amendment of the particular section has been rejected. These board members have thus been deprived of the valuable right and opportunity to properly discharge and perform this duty so heavily resting upon them alone. Outsiders may converse with parents and children as to the school to be attended, where such others have no duty or responsibility in the connection, but school board members cannot do so. The paid agitators and transients and meddlers simply have not produced impressive results

which are statistically favorable to the school board, which has been mandated by the Court to perform its duty, but not allowed by the Court to discharge its responsibility in that connection. The Court finds from such circumstances and conditions that the mathematical statistics as to the working progress of the freedom of choice plan for this reason alone is unfair, unjust, unrealistic and misleading. The plan has not failed. The Court just has not allowed it to work.

There is nothing in *Green* which condemns the freedom of choice plan as it is working in the designated schools in this district. The Court has simply not afforded these schools a fair and just opportunity to try to improve the figure statistics of the plan at work. That opportunity should not be denied or withheld.[6]

The Natchez schools, appearing as Civil Action No. 1120 (W), have demonstrated outstanding progress with the freedom of choice plan. These schools accommodate approximately 10,400 children, 55% of whom are Negro and 45% of whom are white. There are 40 Negro teachers in the predominantly white schools and 53 white teachers in the predominantly Negro schools. There are 456 Negro children in the predominantly white schools. There are 40 white and 70 Negro children in the vocational schools. A

[6] One of the authors of the majority opinion in the *Jefferson* school case (Judge Thornberry) speaking for a panel composed of Judge Brown and District Judge Taylor, in *United States v. Greenwood Municipal Separate School District*, (5 C.A.) 406 F.2d 1086 held: "If it develops that no children in the school district are being denied equal protection of the laws, then no relief will be granted. This was the position taken by the Court below and by another district court which considered the same question. See *United States v. Junction City School District*, W.D., Arkansas, 1966, 253 F.Supp. 766. We agree."

Opinion of the District Court Approving Freedom of Choice Plans

Negro is on the school board. All decisions of the school board have been unanimous. It is the view of the Court in this case that these schools have shown satisfactory and acceptable progress under all of the facts and circumstances, in complying with all of the requirements of the model decree. In this case, as in all of these cases, the bare figure statistics are misleading and tell only part of the story. There would appear to be no occasion or necessity for any updating of the model decree to meet the requirements of *Green*. The movants in this case have simply not shown that any child in this school district has been denied equal protection of the law in any instance. The defendants in this case have satisfied the Court that the freedom of choice plan has worked in that system and the plaintiffs have not shown the contrary by the greater weight of the credible evidence (including statistics). That ends our inquiry here, as set forth in footnote 6. The plaintiff's motion to update the decree in this particular case for the additional reason stated in this case will be denied.

As to the other cases, the plaintiffs have not shown by the greater weight of the more convincing evidence that the freedom of choice plan as to the other schools has not worked and that there is no probable prospect of such plan working. The plan has not been afforded an opportunity and chance to work, and it simply cannot be honestly said that the plan has not worked. It cannot be said from the evidence in this case that the plan will not work if given a chance to do so. The Court, therefore, finds as a fact and holds as a matter of law that the movants in these cases have failed to prove that such freedom of choice plan should be discarded as not workable, and that the schools should be required to adopt another plan which would work

more effectively under the model decree. That conclusion represents the best exercise by this Court of its sound judicial discretion in making that determination, and is surely not clearly erroneous on this record. Insofar as such question is committed to the sound judicial discretion of this Court even though disagreed with by an appellate court, no appellate court can pass judgment anew on that question which is addressed to the trial court and not an appellate court, as was said in *Platt* v. *Minnesota Mining & Manufacturing Co*, 376 US 240, 84 S.Ct. 769. There it was held: "The District Court's use of an inappropriate factor did not empower the Court of Appeals to order the transfers. The function of the Court of Appeals in this case was to determine the appropriate criteria and then leave their application to the trial judge on remand." The motions of these plaintiffs to update the remaining twenty-three cases to conform with *Green* as to the working of the freedom of choice plan to desegregate the student body of these schools will be denied. The status of the faculties in these schools is another matter later to be discussed.

The underlying fundamental principle which is decreed in *Brown* and its satellite decisions is that a denial of his equal protection rights accrues to a Negro not afforded an education in public unitary school system. State enforced segregation in public schools is condemned as an obstacle and barrier to the enjoyment of such vested right. It is universally decreed by the courts at this time that every vestige and influence of such state enforced segregation must be completely eradicated from the state supported public schools; that a unitary school system shall replace the dual system of schools, so that henceforth the system shall operate schools without regard to race or color.

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Most of the schools involved in these cases before the Court have accepted and adopted such principles in good faith and have made impressive strides in that field in compliance with the requirements of the model decree. But the statistics which this Circuit says speaks so loudly, that they listen thereto, do not by themselves make a very attractive bare figure picture of any rewarding or impressive accomplishment. But these statistics alone are misleading, and do not truly and convincingly reflect the facts and circumstances as they actually exist. Surely, a school board is not responsible and is not accountable for a completely voluntary choice of a Negro child who wishes to attend the school which is attended predominantly by Negroes; yet, such a choice would be reflected in these statistics as a failure of the school board to discharge its duty, when the school board is enjoined not to persuade or dissuade the child or the parent in such decision. It simply may not be honestly said under such circumstances that the freedom of choice plan has not worked in such a case! The vast majority of colored children simply do not wish to attend a school which is predominantly white, and white children simply do not wish to attend a school which is predominantly Negro, and that ingrained and inbred influence and characteristic of the races will not be changed by any pseudo teachers, or sociologists in judicial robes. If forced mixing is the ultimate goal in these cases, then extreme care must be exercised by more knowledgeable and more experienced men than mere judges of trial and appellate courts to avoid a complete disruption of our entire educational system in this district. It is easy for a judge in an ivory tower, aloof and afar from the actual working circumstances and conditions in these schools, to rationalize and unilaterally decree the

answer to problems with which he is not familiar and without regard to and consideration for the completely insurmountable barriers to the suggested course of solution. This Court certainly does not possess any of the training, or skill, or experience or facilities necessary to operate any kind of schools; and unhesitatingly admits to its utter incompetence to exercise, or exert any helpful power or authority in that area. These school boards are thus confronted with many very serious and perplexing school problems which will command the very highest skill of their expertise in discharging and performing in accordance with the requirements of law. The responsibility is strictly theirs to carry out the mandate of this Court under penalty of sanctions. If the HEW has any competent and experienced administrative people who could completely divest themselves of all political ambitions and influence, it is possible that they could be of some help to these boards in devising and administering plans for the complete desegregation of these schools without injury to the educational objective. But plans heretofore have not been meaningful or helpful in criticisms thereof before this Court, and have resulted in nothing but a waste of time. Nobody needs any more guidelines or plans any longer to be completely informed of the duty of these school boards. It is unmistakably clear now that this duty does not rest on the parent or on the child to make these plans work, but such duty rests squarely and alone upon the shoulders of these school board members. It is their duty under the injunction heretofore issued by this Court to see that the existing freedom of choice plan for the desegregation of these public schools works now, or will work in the immediate future. If and when it becomes apparent to the Court that a plan is working to the

Order of the District Court dated May 16, 1969

[Caption omitted]

Pursuant to the opinion of Court dated May 13, 1969, it is hereby ordered:

1. That plaintiffs' Motion for a New Plan of Desegregation is denied;

2. That defendants will continue to operate schools located within the Holmes County School District under a freedom of choice plan of desegregation;

3. That defendants shall take positive and affirmative steps to achieve complete desegregation of school facilities so that by the 1970-71 school year the pattern of teacher assignments to each school is not identifiable as tailored for a heavy concentration of either Negro or white pupils. In order to insure full compliance by the commencement of the 1970-71 school year, defendants shall achieve substantial faculty and staff desegregation by the 1969-70 school year.

Ordered this 16th day of May, 1969.

Harold Cox
United States District Judge

Order of the District Court dated May 16, 1969

[Caption omitted]

Pursuant to the opinion of this Court, dated May 13, 1969, it is hereby ordered that defendants' Motion to Dismiss plaintiffs' Motion for a New Plan of Desegregation is sustained.

Ordered, this 16th day of May, 1969.

s/ HAROLD COX
United States District Judge

Order of the District Court dated May 29, 1969

[Caption omitted]

This cause came on to be heard on the Motion of defendants for an order making additional findings herein, said Motion having been filed in this cause by defendants on May 21, 1969, and requesting that the Court amend the Opinion of this Court in this cause dated May 13, 1969 by adding thereto additional findings, and it appearing that the Motion should be granted, it is ordered that the following additional findings be added to the findings heretofore made in this action in the Opinion of this Court dated May 13, 1969:

From the uncontradicted, undisputed, credible evidence offered in this case, that:

1. The disparity between the achievement of the vast majority of the white pupils of the district and the achievement of the vast majority of the Negro pupils of the district is such that an indiscriminate forced attendance of any substantial preconceived percentage or ratio of both races to any particular school would result in pupils of such widely varying achievement abilities being placed in the same class or grade that irreparable damage would be done to the education of all of the pupils in such class or grade and the education of all such pupils would be seriously and adversely affected.

2. The educational desirability of permitting pupils to be in classes or grades where they can identify with the other pupils and where they, within reason, can achieve along with the other pupils in such class or grade is highly important and, under the facts in this case, more than offsets any advantages that might be

obtained by attempting to compel or force pupils to attend a particular school because of his race in order to achieve a larger percentage of an ethnic group at such school.

3. The freedom of choice plan in effect in this school district will result in more statistical mixing of the ethnic groups in the schools of this school district than will any other plan available to the defendants.

4. There is no basis for assuming that the percentage or ratio of ethnic groups at any particular school in a school district would be of more significance in a school district that has a history of *de jure* segregation than in a school district that has a history of *de facto* segregation.

It is further ordered that the making of these additional findings does not require any change in or amendment to the order of this Court dated May 16, 1969, which was entered pursuant to the foregoing opinion.

ORDERED, this the 29th day of May, 1969.

/s/ HAROLD COX
United States District Judge
/s/ DAN M. RUSSELL
United States District Judge
/s/ WALTER M. NIXON
United States District Judge

APPENDIX B

Letter Directive of the Court of Appeals of June 25, 1969

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

ROOM 408-400 ROYAL ST.
NEW ORLEANS, LA. 70130

June 25, 1969

To COUNSEL LISTED BELOW

Nos. 28030 and 28042
United States v. Hinds County School Board, et al.

Gentlemen:

I am directed by the Court to forward the following instructions regarding the 25 consolidated Mississippi school cases (U.S. v. Hinds County School Board, et al.):

1. The Court will hear oral argument on all of these cases on the motion for summary reversal and the merits in all of the cases both private plaintiffs and those of the United States. The argument will be held in New Orleans beginning 9:30 A.M., Wednesday, July 2. Counsel should hold themselves in availability for Thursday, July 3, as well. The parties will work out amongst themselves a suitable proposed schedule of orders and probable times. The Court does not put any specific limitation on time but of course desires no unnecessary repetition.

Letter Directive of the Court of Appeals of June 25, 1969

2. The United States is to arrange for a court reporter, the cost to be charged as costs in the case.

3. The parties are free to file in typewritten form, with xerox copies or similar reproduction, any additional memoranda or briefs and it would be helpful if copies are simultaneously sent both to the Clerk and to the Judges at their home stations. Special effort should be made to have any memoranda, responses, etc. in the Clerk's office by Noon, Tuesday, July 1. Responses and rejoinders will be permitted as desired.

4. The District Clerk is to furnish, and the U. S. Department of Justice is to procure and have available in the courtroom for use by the Judges on the bench, with respect to each school district involved, copies of the latest statistical report required to be filed with the District Court under the Jefferson type decree theretofore entered. Counsel are also directed to supply hopefully in a mutually agreeable way a consolidated recap which sets out the statistical data substantially in the format of the Exhibit "J" attached to the motion of the private plaintiffs-appellants covering each of the Boards of Education. If desired, these tables may be adapted to show relative percentages of all pertinent items including those set forth in Exhibits A through D attached to the response to motion for summary reversal filed June 20 by Messrs. Brodderth and Satterfield.

5. The Court takes notice of Judge Cox's order with respect to the record but since the appeal is being expedited on the original record without reproduction required or permitted, the U. S. Attorney shall make ar-

rangements with the District Clerk to transmit to the Clerk of the Court of Appeals the entire record of the District Court including the transcript of the evidence in all of the cases so that it will be available to the Court as needed during argument and submission. The Court contemplates, however, that the record may be returned in a very short time. If the District Clerk prefers, it would be quite in order for him, one of his deputies, or the U.S. Attorney to transport and deliver the record to the Clerk of the Court of Appeals.

6. The Court's general approach will be to accept the fact findings of the District Court and to determine what, if any, legal relief is now required best thereon. To the extent that appellants, private or government, assert that any one or more specific fact findings (as distinguished from mixed questions of law and fact) are clearly erroneous, the appellants' concerned shall xerox copies of pertinent excerpts of the transcript of the evidence for use by the Judges (4 copies) which may be made available during argument.

7. To enable the Court to announce a decision as quickly as possible after submission, the appellants are requested to file in 15 copies a proposed opinion-order with definitive time table and provisions on the hypothesis that the appeal will be sustained. These should be modeled somewhat on the form used by the Court in its recent opinions in *Hall, et al.* v. *St. Helena Parish School Board, et al.*, No. 26450, May 28, 1969, and *Davis, et al.* v. *Board of School Commissioners of Mobile County, et al.*, No. 26886, June 3, 1969. When and as additional opinion-orders of this type are issued in other school desegregation cases, copies will be

immediately transmitted to all counsel so that the parties can make appropriate comments during argument with respect to suggested modifications or changes in their proposed opinion-orders.

The Court hopes that the appellants, private and government, can collaborate and submit a mutually agreeable proposed opinion-order and it desires from the appellees contrary proposed orders covering separately (a) on the hypothesis that the decrees of the District Court will be affirmed, and (b) on the hypothesis that the appellants' motion and appeals will be sustained for reversal.

8. The Court recognizes that this is a huge record involving a large number of parties and matters of great public interest and importance. Everyone will be heard but the Court also expects the distinguished counsel who appear in this case to collaborate in the best traditions of the bar to the end that waste of time and effort is eliminated and repetition avoided as much as possible. The Clerk will stand ready to be of whatever assistance he can in meeting this very compressed time schedule.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ GILBERT F. GANUCHEAU
Gilbert F. Ganucheau
Chief Deputy Clerk

GFG:adg

cc: (See attached list)

Opinion of the Court of Appeals of July 3, 1969

[Caption omitted]

Before

BROWN, *Chief Judge*,

THORNBERRY and MORGAN, *Circuit Judges*.

PER CURIAM:

As questions of time present such urgency as we approach the beginning of the new school year September 1969-70, the court requested in advance of argument that the parties submit proposed opinion-orders modeled after some of our recent school desegregation cases. We have drawn freely upon these proposed opinion-orders.

These are twenty-five school desegregation cases in a consolidated appeal from an en banc decision of the U. S. District Court for the Southern District of Mississippi. These cases present a common issue: whether the District Court erred in approving the continued use by these school districts of freedom of choice plans as a method for the disestablishment of the dual school systems.

The plaintiffs' position is that the District Court erred in failing to apply the principles announced in recent decisions of the Supreme Court and of this Court.

These same school districts, along with others, were before this Court last year in *Adams* v. *Mathews*, 403 F.2d 181 (5th Cir., 1968). The cases were there remanded with instructions that the district courts determine:

> (1) whether the school board's existing plan of desegregation is adequate "to convert [the dual system] to a unitary system in which racial discrimination

> would be eliminated root and branch" and (2) whether the proposed changes will result in a desegregation plan that "promises realistically to work now."

403 F.2d at 188. In determining whether freedom of choice would be acceptable, the following standards were to be applied:

> If in a school district there are still all-Negro schools or only a small fraction of Negroes enrolled in white schools, or no substantial integration of faculties and school activities then, as a matter of law, the existing plan fails to meet constitutional standards as established in *Green*.

Ibid.

In all pertinent respects, the facts in these cases are similar. No white student has ever attended any traditionally Negro school in any of the school districts. Every district thus continues to operate and maintain its all-Negro schools. The record compels the conclusion that to eliminate the dual character of these schools alternative methods of desegregation must be employed which would include such methods as zoning and pairing.

Not only has there been no cross-over of white students to Negro schools, but only a small fraction of Negro students have enrolled in the white schools.[1] The highest per-

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[1] Illustrative are the following tables, corrected to the latest available data furnished and checked by counsel, in the cases in which the Government is a party showing the racial character of the schools in each district and the enrollment by race:

centage is in the Enterprise Consolidated School District, which has 16 percent of its Negro students enrolled in white schools—a degree of desegregation held to be inadequate in *Green* v. *County School Board*, 391 U. S. 430 (1968). The statistics in the remaining districts range from a high of 10.6 percent in Forrest County to a low of 0.0 percent in Neshoba and Lincoln Counties. For the most part school activities also continue to be segregated. Although Negroes attending predominantly white schools do participate on teams of such schools in athletic contests, in none of the districts do white and all-Negro schools compete in athletics.

RACIAL CHARACTER

District	*Total Number of Schools*	*All-Negro*	*All-White*	*Predominantly White*
Amite	5	2	1	2
Canton	5	3	–	2
Columbia	4	1	–	3
Covington	7	3	1	3
Forrest	9	1	2	6
Franklin	3	1	–	2
Hinds	22	10	1	11
Kemper	5	2	1	2
Lauderdale	5	1	2	2
Lawrence	7	2	3	2
Leake	7	3	3	1
Lincoln	6	2	3	—
Madison	8	4	–	4
Marion	5	1	2	2
Meridian	19	8	–	11
Natchez-Adams	15	7	–	8
Neshoba	2	1	–	1
North Pike	4	1	2	1
Noxubee	6	3	–	3
Philadelphia	3	1	1	1
Sharkey-Issaquena	5	4	–	1
Anguilla-Line	3	2	–	1
South Pike	7	2	–	5
Wilkinson	4	2	–	2

(Continued on opposite page)

These facts indicate that these cases fall squarely within the decisions of the Supreme Court in *Green* and its companion cases and the decisions of this Court. See *United States* v. *Greenwood Municipal Separate School District*, 406 F.2d 1086 (5th Cir. 1969); *Henry* v. *Clarksdale Municipal Separate School District*, No. 23,255 (5th Cir., March 6, 1969); *United States* v. *Indianola Municipal Separate School District*, No. 25,655 (5th Cir., April 11, 1969; *An-*

ENROLLMENT BY RACE AND PERCENTAGE OF NEGROES IN WHITE SCHOOLS

	1968-1969 Enrollment		*Negroes in White Schools*	
District	*Negro*	*White*	*Number*	*Percentage*
Amite	2,649	1,484	63	2.4 %
Canton	3,440	1,352	4	.11%
Columbia	912	1,553	60	6.6 %
Covington	1,422	1,968	89	5.1 %
Forrest	480	3,085	81	16.9 %
Franklin	1,029	1,124	38	3.7 %
Hinds	7,409	6,559	481	6.5 %
Kemper	1,896	786	11	.58%
Lauderdale	1,872	3,060	26	1.4 %
Lawrence	1,263	1,889	32	2.5 %
Leake	1,568	1,950	67	4.3 %
Lincoln	941	1,149	5	.2 %
Madison	3,198	1,128	41	1.3 %
Marion	1,082	1,741	34	3.1 %
Meridian	3,974	5,805	606	15.2 %
Natchez-Adams	5,509	4,496	541	9.8 %
Neshoba	591	1,875	1	.16%
North Pike	632	708	2	.31%
Noxubee	3,002	829	95	3.2 %
Philadelphia	406	923	11	2.7 %
Sharkey-Issaquena	1,241	603	104	6.4 %
Anguilla-Line	769	207	30	3.9 %
South Pike	1,737	994	46*	2.6 %
Wilkinson	2,032	689	55	2.7 %

Note: There is a disagreement over proper accounting for some special classes which, for these purposes, we consider unimportant.

thony v. *Marshall County Board of Education*, No. 26,432 (5th Cir., April 15, 1969); *Hall* v. *St. Helena Parish School Board*, No. 26,450 (5th Cir., May 28, 1969); *Davis* v. *Board of School Commissioners of Mobile County*, No. 26,886 (5th Cir., June 3, 1969); *United States* v. *Jefferson County Board of Education*, No. 27,444 (5th Cir., June 26, 1969); *United States* v. *Choctaw County Board of Education*, 5 Cir. 1969, F.2d (No. 27, 297, July 1, 1969); *United States* v. *The Board of Education of Baldwin County*, 5 Cir. 1969, F.2d (No. 27,281, July 1, 1969); *United States* v. *The Board of Education of the City of Bessemer*, 5 Cir. 1969, F.2d (Nos. 26,582; 26,583; 26,584; July 1, 1969). The proper conclusion to be drawn from these facts is clear from the mandate of *Adams* v. *Mathews*, *supra*: "as a matter of law, the existing plan fails to meet constitutional standards as established in *Green*."

We hold that these school districts will no longer be able to rely on freedom of choice as the method for disestablishing their dual school systems.

This may mean that the tasks for the courts will become more difficult. The District Court itself has stated that it "does not possess any of the training or skill or experience or facilities to operate any kind of schools; and unhesitatingly admits to its utter incompetence to exercise or exert any helpful power or authority in that area." And this Court has observed that judges "are not educators or school administrators." *United States* v. *Jefferson County Board of Education*, *supra* at 855. Accordingly, we deem it appropriate for the Court to require these school boards to enlist the assistance of experts in education as well as desegregation; and to require the school boards to cooperate with them in the disestablishment of their dual school systems.

With respect to faculty desegregation, little progress has been made.[2] Although Natchez Municipal Separate District has a level of 19.2% and Lawrence County a level of 10.6%, seven school districts have less than one full-time teacher per school assigned across racial lines. In the remaining systems, fewer than 10 percent of the full-time faculties teach in schools in which their race is in the minority. Faculties must be integrated. United States v. Montgomery

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[2] The latest corrected figures (see Note 1 supra) are:

	Full & part time teachers		*Full time desegregating teachers*		*Part time desegregating teachers*	
District	*Negro*	*White*	*Negro*	*White*	*Negro*	*White*
Amite	95	66	0	0	0	0
Canton	120	81	3	11	1	9
Columbia	43	71	5	4	0	4
Covington	64	103	3	3	1	5
Forrest	43	122	4	3	1	2
Franklin	44	45	3	4	1	1
Hinds	295	281.9	22	0		
Kemper	68	45	0	1	0	3
Lauderdale	82	131	8	3	0	0
Lawrence	50	81	10	4	0	1
Leake	87	90	0	3	0	1
Lincoln	38	74	0	0	0	0
Madison	147	66	0	8	0	1
Marion	48	96	4	6	0	0
Meridian	180	317	8	17	4	10
Natchez-Adams	484		0	0	40	53
Neshoba	35	86	0	3	0	2
North Pike	26	30	1	2	1	2
Noxubee	135	61	6	1	0	0
Philadelphia	25	46	0	0	0	2
Sharkey-Issaquena	71	31	0	0	0	0
Anguilla-Line			0	0	0	0
South Pike	78	52.8	2	3.3	0	2
Wilkinson	97	39	0	6	0	0

County Board of Education, No. 798, at 8 (Sup.Ct., June 2, 1969). Minimum standards should be established for making substantial progress toward this goal in 1969 and finishing the job by 1970. United States v. Board of Education of the City of Bessemer, 5 Cir., 1968, 396 F.2d 44; Choctaw County, supra, Baldwin County, supra.

The Court on the motion to summarily reverse or alternatively to expedite submission of the case filed by the Government and the private plaintiffs concluded that fundamental constitutional rights of many persons would be jeopardized, if not lost, if this Court routinely calendared this case for briefing and argument in the regular course. Before we could ever hear it, the opening of the school year September 1969-1970 would have gone by. With this and the total absence of any new issue even resembling a constitutional issue in this much litigated field, we therefore concluded that the appeals should be expedited. Full arguments were had and representatives from every District were heard from. In the course of these arguments, several contentions were made as to which we make these additional specific comments.

Based upon opinion surveys conducted by presumably competent sampling experts, testimony of school administrators, board members, and educational experts, the School Districts urged, and the District Court found in effect, that the failure of a single white student to attend an all-Negro school was due to the provisions of our *Jefferson* decree which in effect prohibited school authorities from influencing the exercise of choice by students or parents. We find this completely unsupported. This record affords no basis for any expectation of any substantial change were the provision modified.

Based upon similar testimony, the School Districts urged a related contention that the uncontradicted statistics showing only slight integration are not a reliable indicator of the commands of *Green*. This argument rests on the assertion that quite apart from a prior dual race school system, there would be concentration of Negroes or white persons from what was described as "polarization." To bolster this, they pointed to school statistics in non-southern communities. Statistics are not, of course, the whole answer, but nothing is as emphatic as zero, and in the face of slight numbers and low percentages of Negroes attending white schools, and no whites attending Negro schools, we find this argument unimpressive.

In the same vein is the contention similarly based on surveys and opinion testimony of educators that on stated percentages (e.g., 20%, 30%, 70%, etc.), integration of Negroes (either from influx of Negroes into white schools or whites into Negro schools), there will be an exodus of white students up to the point of almost 100% Negro schools. This, like community response or hostility or scholastic achievement disparities, is but a repetition of contentions long since rejected in Cooper v. Aaron, 1958, 358 U.S. 1, —— S.Ct. ——, —— L.Ed. ——; Stell v. Savannah-Chatham County Bd. of Ed., 5 Cir., 1964, 333 F.2d 55, 61; and United States v. Jefferson County Bd. of Ed., 5 Cir., 1969 —— F.2d —— [No. 27444, June 26, 1969].

The order of the District Court in each case is reversed and the cases are remanded to the District Court with the following direction:

1. These cases shall receive the highest priority.

2. The District Court shall forthwith request that educators from the Office of Education of the United States

Department of Health, Education and Welfare collaborate with the defendant school boards in the preparation of plans to disestablish the dual school systems in question. The disestablishment plans shall be directed to student and faculty assignment, school bus routes if transportation is provided, all facilities, all athletic and other school activities, and all school location and construction activities. The District Court shall further require the school boards to make available to the Office of Education or its designees all requested information relating to the operation of the school systems.

3. The board, in conjunction with the Office of Education, shall develop and present to the District Court before August 11, 1969, an acceptable plan of desegregation.

4. If the Office of Education and a school board agree upon a plan of desegregation, it shall be presented to the District Court on or before August 11, 1969. The court shall approve such plan for implementation commencing with the 1969 school year, unless within seven days after submission to the court any party files any objection or proposed amendment thereto alleging that the plan, or any part thereof, does not conform to constitutional standards.

5. If no agreement is reached, the Office of Education shall present its proposal to the District Court on or before August 11, 1969. The Court shall approve such plan for implementation commencing with the 1969 school year, unless within seven days a party makes proper showing that the plan or any part thereof does not conform to constitutional standards.

6. For plans to which objections are made or amendments suggested, or which in any event the District Court will not approve without a hearing, the District Court shall

hold hearings within five days after the time for filing objections and proposed amendments has expired. In no event later than August 21, 1969.

7. The plans shall be completed, approved, and ordered for implementation by the District Court no later than August 25, 1969. Such a plan shall be implemented commencing with the beginning of the 1969-1970 school year.

8. Because of the urgency of formulating and approving plans to be implemented for the 1969-70 school term it is ordered as follows: The mandate of this Court shall issue immediately and will not be stayed pending petitions for rehearing or certiorari. This Court will not extend the time for filing petitions for rehearing or briefs in support of or in opposition thereto. Any appeals from orders or decrees of the District Court on remand shall be expedited. The record on any appeal shall be lodged with this court and appellants' brief filed, all within ten days of the date of the order or decree of the district court from which the appeal is taken. Appellee's brief shall be due ten days thereafter. The court will determine the time and place for oral argument if allowed. The court will determine the time for briefing and for oral argument if allowed. No consideration will be given to the fact of interrupting the school year in the even further relief is indicated.

REVERSED AND REMANDED WITH DIRECTIONS

Modification of Order of the Court of Appeals of July 25, 1969

[Caption omitted]

Before

BROWN, *Chief Judge*,
THORNBERRY and MORGAN, *Circuit Judges*.

PER CURIAM:

The opinion published in the above styled cases on July 3, 1969 is hereby modified by renumbering former paragraph 8 to be number 7 and striking from such order, on pages 17 and 18, paragraphs 5, 6 and 7 in their entirety, and inserting in lieu thereof new paragraphs 5 and 6 which shall read as follows:

5. If no agreement is reached, the Office of Education shall present its proposal for a plan for the school district to the district court on or before August 11, 1969. The parties shall have ten (10) days from the date such a proposed plan is filed with the district court to file objections or suggested amendments thereto. The district court shall hold a hearing on the proposed plan and any objections and suggested amendments thereto, and shall enter a plan which conforms to constitutional standards no later than ten (10) days after the time for filing objections has expired.

6. A plan for the school district shall be entered for implementation by the district court no later than September 1, 1969 and shall be effective for the beginning of the 1969-1970 school year. The district court shall enter Findings of Fact and Conclusions of Law

Modification of Order of the Court of Appeals of July 25, 1969

regarding the efficacy of any plan which is approved or ordered to immediately disestablish the dual school system in question. Jurisdiction shall be retained, however, under the teaching of *Green* v. *County School Board of New Kent County*, 391 U. S. 430, 439 (1968), and *Raney* v. *Board of Education of Gould School District*, 391 U.S. 443, 449 (1968), until it is clear that disestablishment has been achieved.

APPENDIX C

Letter of August 11, 1969 Transmitting Desegregation Plans From United States Office of Education to the District Court

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
WASHINGTON, D. C. 20202

August 11, 1969

Judge William H. Cox
United States District Court
Southern District of Mississippi
Post Office Drawer 2447
Jackson, Mississippi 39205

Dear Judge Cox:

Re: United States of America v.
Hinds County School Board et al
and related cases subject to the
Court's Order of July 3, 1969

The enclosed desegregation plans were developed as a result of the Court's Order of July 3, 1969, in the above-referenced cases.

The technical assistance teams who carried out this work were made up of 27 educators and were under the direction of Mr. Jesse J. Jordan, Senior Program Officer of the Division of Equal Educational Opportunities, U. S. Office of Education, Department of Health, Education, and Welfare, headquartered in Atlanta, Georgia. (Attachment A contains identifying information for each of the 27 educators involved.)

Letter of August 11, 1969 Transmitting Desegregation Plans From United States Office of Education to the District Court

On July 11, 1969, I wrote to the superintendent of each school district named in the Order, advising him of the availability of services in the development of a desegregation plan. The letter provided the name, address, and telephone number of Mr. Jordan, and described the various types of information which would be needed from the school district for us to use in preparing a desegregation plan. (Attachment B is an example of this letter.)

Shortly after I sent my letter of July 11 to the Superintendents, we contacted each by telephone and an appointment was made for a technical assistance team to visit the school district to gather all the materials necessary for developing a desegregation plan. As a result of cooperation between the local school officials and the technical assistance personnel, the following data were acquired:

1) Building information—by school, the number of permanent teaching stations, capacity of each building, current student enrollment by race and grade, number of full-time and part-time teachers by race, number of students transported, age of building, type of construction, size of school site, and list of facilities such as cafeteria, gymnasium, library, etc.

2) Proposed building information—future construction plans.

3) Pupil Locator Maps (where available)—to show residence of Negro and white students.

4) School and School Site Map—to show location of each school in the district, coded as to grade levels of students.

5) Demographic Information (where available)—giving population distribution of the community by race.

Letter of August 11, 1969 Transmitting Desegregation Plans From United States Office of Education to the District Court

A technical assistance team, composed of at least two (2) trained educators, visited or offered to visit each of the school districts at least three (3) times during this period. On the first visit, they viewed existing school facilities, gathered data, and discussed with local school officials their ideas for school desegregation and the administrative problems involved. On the second visit, they discussed with local school officials the team's tentative thoughts concerning a desegregation plan for the district, and attempted to elicit the ideas of the school officials as to alternative sound and feasible desegregation plans. Where the offer of a third visit was accepted, the team presented to the school officials the plan which the Office of Education intended to recommend to the Court, subject to amendments resulting from this meeting. At all times the Office of Education staff attempted to collaborate with the school officials in developing an effective and mutually acceptable plan.

The information we have used in formulating our plans was obtained, unless otherwise stated, from school district officials. For example we have described in each plan the information on which it is based. At the end of the proposed plans, we have inserted photocopies of reports and building information forms. While these are not signed, the information in them was furnished by officials of the school district. We were unable to duplicate maps which we used. We have attempted to indicate those instances where information is the result of observation of our staff.

In some cases school officials were not able to furnish precise information about student residences by race (pupil locator), or other demographic information. Also, in most instances, school officials did not furnish us with an estimate of enrollment for the 1969-70 school year, other than projec-

tions of the 1968-69 enrollment. The enrollment of each school district is stable enough to make use of such projections, a generally acceptable practice, in planning for the use of schools for the 1969-70 school year. In some cases, however, it is possible that these projections do not accurately reflect the numbers of children who reside in the area of a given school. This possibility stems from the fact that traditionally in these school districts there has been extensive bussing of children to schools outside the areas of their residence.

Where our information was not precise enough, we avoided drawing exact geographic boundaries for school attendance areas. Rather, we provided guides from which these lines can be drawn to achieve at least the measure of desegregation indicated in the projection tables of our proposals. Because each proposal was not prepared by the same individual, this concept is worded in several different ways. In each case, however, we intend the same meaning. For example, when we recommend that children attending a certain school shall be assigned as specified or that children from a particular school be assigned to a specified place, we mean that all children living in the area of the school that is named should be so assigned through adoption of attendance lines so drawn as to utilize properly the school facilities and achieve at least the measure of desegregation indicated in the proposal. It should be clear that in such a case, we do not intend to recommend that a child who has been bussed into the area from another area under freedom of choice is to continue to attend that school, except possibly pursuant to a proper transfer policy, including one for majority-to-minority transfer as described in Section VI of our proposals.

Letter of August 11, 1969 Transmitting Desegregation Plans From United States Office of Education to the District Court

I believe that each of the enclosed plans is educationally and administratively sound, both in terms of substance and in terms of timing. In the cases of Hinds County, Holmes County, and Meridian, the plans that we recommend provide for full implementation with the beginning of the 1970-71 school year. The principal reasons for this delay are construction, and the numbers of pupils and schools involved. In all other cases, the plans that we have prepared and that we recommend to the Court provide for complete disestablishment of the dual school system at the beginning of the 1969-70 school year. Should the Court decide, however, to defer complete desegregation in any of these school districts beyond the opening of the coming school term, we have prepared and set out in the plans, steps which could, in our judgment, be taken this fall to accomplish partial desegregation of the school system at the opening of the 1969-70 school term.

The entire staff who participated wish to express appreciation for the cooperation we received from the school districts and for the opportunity the Court has given us to assist in the development of these desegregation plans.

Sincerely yours,

/s/ Gregory R. Anrig
Gregory R. Anrig, Director
Equal Educational Opportunities
U. S. Office of Education

Attachments:
A
B

Attachment A Annexed to Letter of August 11, 1969

Name	*Experience*	*Number of Years*
Gregory R. Anrig	Teacher	3
	Asst. Principal	1
	Principal	4
	Superintendent	3
	Division Director, U. S. Office of Education	2
James E. Barnes	Teacher	4
	Executive Director, Berkshire Co. Action Council	1
	Education Coordinator, Hartford County, Conn.	2
	Director, Education Programs for Disadvantaged	2
	OE Fellowship, Title IV, U. S. Office of Education	1
Edwin Blue	Teacher-Principal	26
	Superintendent	4
	Field Representative, Auburn University	½
Walter D. Branch	Teacher	1
	Teaching Principal	2½
	Principal	9
	Asst. Superintendent	2
	Research Assoc. & Program Coord., Southeastern Education Laboratory	1
	Program Officer, Title IV, U. S. Office of Education	1⅙

Attachment A Annexed to Letter of August 11, 1969

Name	*Experience*	*Number of Years*
Frank Carter	Assistant Dir. of Student Teaching, Virginia State College	2
	Dir. Student Personnel, Virginia State College	7
	Program Officer, Title IV, U. S. Office of Education	1¼
E. H. Cooper	Teacher-Coach	11
	Principal	4
	Superintendent	5
	Program Officer, Title IV, U. S. Office of Education	1⅙
Edna Ellicott	Education Program Specialist, U. S. Office of Education	2
Thomas W. Fagin	Curriculum Asst. & Consult	2
	Teacher	4
	Program Officer, Title IV, U. S. Office of Education	¼
Alfred P. Fain	Teacher	5
	Teaching Principal	4
	Principal	4
	Asst. Superintendent	1
	Superintendent	1
	Asst. to Commissioner on Education—Guam	2
	Director, Vocational & Secondary Education, Virgin Islands	2

Attachment A Annexed to Letter of August 11, 1969

Name	*Experience*	*Number of Years*
Alfred P. Fain (cont'd)	Director, Peace Corps Training	4½
	Program Officer, Title IV, U. S. Office of Education	1
Richard L. Fairley	Teacher	5
	Education Specialist	3
	Education Specialist, U. S. Office of Education	3
	Branch Chief, U. S. Office of Ed.	2
Joseph J. Franchina	Teacher	5
	Assistant Principal	4
	Principal	19
	Superintendent	5
	Program Officer, Title III, ESEA	1⅙
	Program Officer, Title IV, U. S. Office of Education	1¼
Marilyn C. Galvin	Education Program Specialist U. S. Office of Education	4
Illard J. Hunter	Teacher	2
	Principal	2
	Superintendent	6
	Program Officer, Title IV, U. S. Office of Education	1⅓
J. C. James	Teacher	8
	Dean of Admissions	6
	Education Specialist, U. S. Office of Education	3

Attuchment A Annexed to Letter of August 11, 1969

Name	*Experience*	*Number of Years*
J. J. Jordan	Teacher	3
	Principal	3
	Director, Transp., Maint. & Operations, & Federal Prog., Asst. Superintendent	12
	Program Officer, Title IV, U. S. Office of Education	1⅓
Wilmer Kerns	Teacher	1½
	Guidance Counselor	5
	Visiting Teacher	2½
	Education Program Specialist, U. S. Office of Education	1⅔
John R. Lovegrove	Teacher	8
	Principal	8
	College Instructor	1
	N.Y. State Central School Study Research	2
	Supv. Instr., State Dept. of Ed.	2
	Dir., Guidance & Testing, State Dept. of Education	2
	Program Officer, Title IV, U. S. Office of Education	1⅙
Hilda Maness	Teacher	1
	Educational Research, Library of Congress	¼
	Teacher—Peace Corps	½
	Textbook Writer, Ethiopia, Ministry of Education	½

Attachment A Annexed to Letter of August 11, 1969

Name	*Experience*	*Number of Years*
Hilda Maness (cont'd)	Education Program Specialist, U. S. Office of Education	2
Clyde W. Matthews	Teacher	2
	College Instructor	3
	Director, Neighborhood Youth Corps, Greenville, N.C.	2
	Program Officer, Title IV, U. S. Office of Education	1
Robert T. Morris	Teacher	1
	College Instructor	1
	Program Officer, Title IV, U. S. Office of Education	1⅙
William T. Nallia	Teacher-Coach	3
	Principal	2
	Asst. Superintendent	2
	Asst. Coord. Title I, State Dept. of Education	1
	Coord. Field Services, Title IV, University of S. Alabama	2
Robert A. Skaife	Teacher	10
	Supervisor	1
	Principal	5
	NEA Field Secretary	8
	Teacher Organ— Executive Secretary	9
	College Teacher	½

Attachment A Annexed to Letter of August 11, 1969

Name	*Experience*	*Number of Years*
Robert A. Skaife (cont'd)	Education Program Specialist, Title IV, U. S. Office of Education	3
Howard Sullins	Teacher	4
	Principal	13
	Superintendent	3
	Program Officer, Title IV, U. S. Office of Education	1
M. Edward Sullivan	Teacher	4
	Principal	7
	Asst. Superintendent	1
	Education Program Specialist, Title IV, U. S. Office of Educ.	2
Albert G. Tippitt	Principal	21
	Dean of College	1
	College Instructor	1
	Teacher	3
	Program Specialist, Title IV U. S. Office of Education	1
Charlie T. Trussell	Teacher	7
	Principal	12
	Program Director, Title III	1
	Program Officer, Title IV, U. S. Office of Education	1½
Bobby M. Bowen	Teacher-Coach	8
	Program Officer, Title IV, U. S. Office of Education	1¼

Attachment B Annexed to Letter of July 11, 1969

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
WASHINGTON, D. C. 20202

Bureau of Elementary and
Secondary Education

July 11, 1969

Dear Superintendent:

In accordance with the July 5, 1969, order of the United States District Court for the Southern District of Mississippi, I wish to call to your attention the technical assistance available to you under Title IV of the Civil Rights Act of 1964. For assistance in developing a desegregation plan for your district, contact the following person:

Mr. Jesse J. Jordan
Senior Program Officer
Equal Education Opportunities
Office of Education/BESE
50 Seventh Street, NE.
Atlanta, Georgia 30323
Telephone: Area Code 404 526-3076

Because of the number of districts to be served under this order and the limited time for plan development, we will be asking each district which requests Title IV assistance to make available pupil locator, transportation, and—where

appropriate—zone maps for the district as currently organized. Mr. Jordan can answer any questions regarding these maps.

A brochure describing our services is enclosed for your information.

Sincerely yours,

/s GREGORY R. ANRIG
Gregory R. Anrig, Director
Division of Equal Educational Opportunities

Enclosure

Letter of August 19, 1969 From the Secretary of the Department of Health, Education and Welfare to the Chief Judge of the Court of Appeals

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE
Washington, D.C. 20201

August 19, 1969

Dear Judge Brown:

In accordance with an Order of the United States Court of Appeals for the Fifth Circuit, experts from the Office of Education in the Department of Health, Education, and Welfare have developed and filed terminal plans to disestablish the dual school systems in 33 Mississippi school district cases.

These terminal plans were developed, reviewed with the school districts, and filed with the United States District Court for the Southern District of Mississippi on August 11, 1969, as required by the Order of the United States Court of Appeals for the Fifth Circuit. These terminal plans were developed under great stress in approximately three weeks; they are to be ordered for implementation on August 25, 1969, and ordered to be implemented commencing with the beginning of the 1969-1970 school year. The schools involved are to open for school during a period which begins two days before August 25, 1969, and all are to be open for school not later than September 11, 1969.

On Thursday of last week, I received the terminal plans as developed and filed by the experts from the Office of Education. I have personally reviewed each of these plans. This review was conducted in my capacity as Secretary of the Department of Health, Education, and Welfare and as the Cabinet officer of our Government charged with the ultimate responsibility for the education of the people of our Nation.

Letter of August 19, 1969 From the Secretary of the Department of Health, Education and Welfare to the Chief Judge of the Court of Appeals

In this same capacity, and bearing in mind the great trust reposed in me, together with the ultimate responsibility for the education of the people of our Nation, I am gravely concerned that the time allowed for the development of these terminal plans has been much too short for the educators of the Office of Education to develop terminal plans which can be implemented this year. The administrative and logistical difficulties which must be encountered and met in the terribly short space of time remaining must surely in my judgment, produce chaos, confusion, and a catastrophic educational setback to the 135,700 children, black and white alike, who must look to the 222 schools of these 33 Mississippi districts for their only available educational opportunity.

I request the Court to consider with me the shortness of time involved and the administrative difficulties which lie ahead and permit additional time during which experts of the Office of Education may go into each district and develop meaningful studies in depth and recommend terminal plans to be submitted to the Court not later than December 1, 1969.

Sincerely,

Secretary

/s/ Robert H. Finch

cc: Hon. Dan M. Russell, Jr.

Hon. Walter L. Nixon, Jr.

Order of the Court of Appeals of August 20, 1969

[Caption omitted]

Before

BROWN, *Chief Judge*,
THORNBERRY and MORGAN, *Circuit Judges*.

PER CURIAM:

On August 19, 1969, Judge John R. Brown received by safehand courier the attached communication of August 9, 1969 (marked Exhibit 1) from the Secretary of Health, Education and Welfare which in turn enclosed a copy of his communication of like date to Judges Cox, Russell and Nixon (marked Exhibit 2). Presumably this was delivered directly to the Judges concerned because the orders of this Court and the District Court pursuant thereto call upon the Department of Health, Education and Welfare to take certain action.

As the timetable heretofore fixed was substantially that recommended by the United States Attorney General in response to the request made by this Court to all parties prior to the argument of this case in July 1969, the Court, being of the opinion that it was essential to know at the earliest time the position of the parties as expressed in due order through their respective counsel, made inquiry of the Department of Justice. The Court was informed that motions were in the course of preparation for immediate filing in the District Court with appropriate similar motions in the Court of Appeals seeking the entry of orders granting the suggested extension to December 1, 1969.

The Court has taken no action other than to record these facts.

ENTER: August 20, 1969.

APPENDIX D

Findings of Fact and Conclusions of Law of the District Court Entered August 26, 1969

[Caption omitted]

In an opinion-order of July 3, 1969, a panel of three Judges on the Fifth Circuit Court of Appeals, reversed the decision of three District Judges sitting as the District Court of the Southern District of Mississippi upholding freedom of choice plans for the desegregation of students and faculties in twenty-five cases including thirty school districts on the docket of this Court.

The opinion-order, as amended, directed the District Court in each case to request educators from the Office of Education of the United States Department of Health, Education and Welfare, hereinafter called HEW, to collaborate with the respective defendant school boards in the preparation of plans to disestablish "the dual school systems." The opinion-order provided that each school board shall develop and present to the District Court before August 11, 1969, an acceptable plan of desegregation. It provided that if the board and HEW agreed upon a plan, the plan should be presented to the District Court on or before August 11, 1969, and the Court should approve such plan unless within seven days after submission any party should file an objection or proposed amendment alleging that the plan, or any part thereof, did not conform to constitutional standards. The opinion-order further provided that if no agreement be reached HEW should present its proposed plan on or before August 11, 1969, and the parties should have 10 days from the date of filing to file objections or suggested amendments thereto. The opinion-order further directed the District Court to hold

a hearing on the proposed plan and objections and amendments thereto and to enter a plan no later than September 1, 1969, to be effective for the beginning of the 1969-70 school year, retaining jurisdiction until it was clear to the Court that disestablishment had been achieved.

With respect to three school districts, those of Hinds County, Holmes County, and Meridian, the HEW recommended plans provided for full implementation beginning with the 1970-71 school year. As to all other districts, HEW has submitted two proposals—one for complete disestablishment beginning with the 1969-70 school year, and one for partial or interim desegregation at the opening of the 1969-70 term.

On the date of August 20, 1969, one day prior to the deadline set by the United States Court of Appeals for the Fifth Circuit in its Opinion and Mandate for all parties to file their proposed plans, objections, suggested modifications and affidavits, this Court was informed through telephone conversation with Chief Judge John R. Brown of the Fifth Circuit that he was in receipt of a letter dated August 19, 1969 from Honorable Robert H. Finch, Secretary of Health, Education and Welfare, the substance of which was that the Secretary had received the terminal plans as developed and filed by the experts in the Office of Education of the Department of HEW, and had reviewed each of the plans, he being charged with the ultimate responsibility for the education of the people of the United States in this letter, which was subsequently hand-delivered to both of the undersigned on the same date, namely, August 20, 1969, and which is attached to the original Motion filed in the Court of Appeals on August 21, 1969, by the United States For Leave to File Motion Seeking

Modification of Mandate, the Secretary stated that he was gravely concerned that the time allowed for the development of these terminal plans was much too short for the educators of the Office of Education to develop terminal plans which can be implemented in the school year 1969-70, which this Court finds was to open on August 20, in some of the school districts involved, with various other opening dates between that date and September 2, 1969. The Secretary further stated in his letter that the administrative and logical difficulties which must be encountered and met in the "terribly short space of time remaining" must surely in his judgment, "produce chaos, confusion, and a catastrophic educational setback to the 135,700 children, black and white alike, who must look to the 222 schools of these 33 (sic) school districts for their only available educational opportunity." The Secretary, therefore, in the concluding paragraph of his letter requested the Court of Appeals and this Court to consider the shortness of time involved and the administrative difficulties which lie ahead and permit additional time during which experts of the Office of Education may go into each school district and develop meaningful, studies in depth and recommended terminal plans to be submitted to the Court not later than December 1, 1969.

The above letter from the Secretary was attached to a motion filed on August 21, 1969 by the United States, entitled Motion of the United States for Leave to File Motion Seeking Modification of Mandate, to which was attached a proposed order of the United States Court of Appeals for the Fifth Circuit. Due to the extreme emergency resulting from the shortness of time, Chief Judge Brown of the Fifth Circuit, in a telephone conversation with the under-

signed Judges suggested and requested that this Court conduct a hearing on the motion filed by the United States, and make a record thereon, and enter findings of fact and conclusions of law, all of which should be transmitted to the three judges composing the panel which reversed the decisions of this Court in an opinion of July 3, 1969, which was subsequently modified on July 25, 1969. Chief Judge Brown directed that the record, which would be transcribed immediately, and this Court's written Findings of Fact and Conclusions of Law be filed forthwith with the Clerk of the United States Court of Appeals for the Fifth Circuit in New Orleans and that copies be transmitted to the three Judges composing the panel which reversed this case, at their home offices, namely, Chief Judge John R. Brown, Judge Homer Thornberry and Judge Lewis R. Morgan. The Chief Judge also instructed this Court to inform all counsel of record, which this Court has done, that anyone objecting to or wishing to offer any evidence on this motion, which was subsequently amended by the Government on August 25, 1969, must do so by presenting in person or in some other suitable manner, their objections and affidavits together with memoranda to the above three judges on the panel at their home offices no later than the morning of Wednesday, August 27, 1969.

The Amended Motion filed by the United States in the Court of Appeals and in this Court moves the United States Court of Appeals for an order amending its order or mandate of July 3, 1969 and subsequent amendments [illegible] to, in accordance with the new proposed "New Amended Order" attached to said amended motion. The substance of the Amended Motion and the proposed "New Amended Order" filed by the United States in these cases, all of

which were consolidated in the United States Court of Appeals and are being treated as consolidated cases here, is that Paragraphs 3-7 should be deleted and the paragraphs contained in the suggested New Order, 3—7, be substituted therefor. For the sake of brevity and because of the time limitation, this Court will not recite in detail the Amended Motion and proposed "New Amended Order", but in effect it provides that the school boards, in conjunction with the Office of Education, shall develop and present to the United States District Court for the Southern District of Mississippi on or before December 1, 1969, an acceptable plan of desegregation, and if the Office of Education and the school boards agree upon the plan it shall be presented to the District Court on or before that date and shall be approved, unless within fifteen days after submission to the Court, any party files an objection or proposed amendment thereto in accordance with the terms of said order. If no agreement is reached, the Office of Education shall present its plan for desegregation of the school districts to this Court on or before December 1, 1969, and the parties shall have 15 days within which to object or file suggested amendments thereto. The proposed New Amended Order further provides that this Court shall hold a hearing on the proposed plan and any objections and suggested amendments thereto and promptly approve a plan which shall conform to constitutional standards, while at the same time, entering findings of fact and conclusions of law regarding the efficacy of any approved plan.

Paragraph 6 of the proposed New Amended Order, as modified by the Government through dictation into the record in this case, provides that by October 1, 1969 the Board of Trustees, in conjunction with the Office of Education shall develop a program to prepare its faculty and

Findings of Fact and Conclusions of Law of the District Court Entered August 26, 1969

staff for the conversion from dual to unitary school system and that the Office of Education shall report to this Court on October 1, 1969 with respect to this program. In the event that the Board fails to develop a program, the Office of Education shall submit a program which the Court may approve unless meritorious objection shall be made thereto.

Paragraph 7, as modified and revised by counsel for the Government through dictation into the record during the hearing on the motion before this Court, provides "The Boards shall not let any new contracts for the construction of any new facilities nor materially alter any existing facilities until a terminal plan has been approved by the court, except with the prior agreement of all parties or by order of the court upon motion and hearing. The Boards shall present its proposals to the parties and seek their consent at least fifteen days prior to moving for court approval."

Attorneys for private plaintiffs filed in the Court of Appeals an "Opposition to Motion for Permission to Withdraw Plans Filed by the Department of Health, Education and Welfare".

Attorneys for private plaintiffs filed a motion dated August 21, 1969 in the United States Court of Appeals for the Fifth Circuit, but did not file a copy thereof with this Court, and therefore this Court does not know its filing date. Private plaintiffs appear alone as plaintiffs in Civil Actions numbered 1209, 1302 and 3779, which encompass six separate school districts, and prior to being allowed to intervene and being aligned as plaintiffs in several additional cases during this hearing of yesterday, appeared as plaintiffs together with the United States in Civil Actions numbered 1096, 1300, 3382 and 3700, involving six separate school districts, and now also appear as plaintiffs as of yesterday in Civil Actions numbered 1160.

Findings of Fact and Conclusions of Law of the District Court Entered August 26, 1969

It was agreed by all counsel in the hearing conducted by this Court that private plaintiffs' opposition to withdrawal of the HEW plan apply to only those cases in which they appear as parties, but that the Government's amended motion applied to all of these cases in which the HEW had filed proposed plans pursuant to the order and mandate of the United States Court of Appeals. Motion was also granted allowing all of the defendant school boards in all of these cases before the Court to join in the Motion and Amended Motion filed by the United States and the proposed New Amended Order with the exception of Paragraph 7 thereof, which relates to new construction and alteration of present structures.

This Court conducted a full-day hearing on August 25, 1969, receiving testimony on the Amended Motion filed by the United States, during which three witnesses testified, two for the United States in support of its motion, and one for the private plaintiffs in opposition to the motion.

The Court finds that the testimony by Dr. Myron Lieberman, the only witness to testify for the private plaintiffs in opposition to the Government's motion, is not entitled to much weight, if any, due to the fact that he had never visited any of the school districts in question and was not familiar with the facilities, school bus routes, qualifications of the faculty, physical composition of the various classrooms, including laboratories in the various buildings, or any other of the vital aspects necessary to form an opinion or make a judgment in connection with the relief sought in the motion filed herein. On cross examination, this witness, who appeared to be more an integration expert than an education expert, interested more in the constitutional aspect rather than educational aspect of the plans under consideration,

admitted on cross examination that he had no experience as a principal or assistant principal of any elementary or high school and had no administrative experience nor operating experience in any school as a superintendent thereof; had never drawn a curriculum or student assignment plan nor any transportation plan for any high school or elementary school; had never participated in the opening of an elementary or high school; and that his only familiarity with the plans of the HEW concerning which he testified, was a two-hour perusal of these plans the night before this hearing, from 9:30 to 11:30 PM, and a short discussion with the attorneys for the private plaintiffs. In any event, the Court finds that his testimony is clearly and convincingly outweighed by that of the two witnesses who testified in support of the motion.

Mr. Jessie J. Jordan, of Smyrna, Georgia, who has been with the Department of Health, Education and Welfare for approximately two years, serving as Senior Program Officer for Title IV of the Civil Rights Act of 1964, received a Bachelor of Science degree in Education and Mathematics, and a Masters degree in School Administration. This witness has been a classroom teacher for three years, has served as high school principal for three years, and was an administrative officer, director of transportation, director of maintenance and operation and assistant superintendent over a twelve-year period in the Cobb County, Georgia school system. This school district has 55 schools with approximately 40,000 to 50,000 students and involves the utilization of about 150 buses. Mr. Jordan testified that he has done desegregation work in a six-state area for HEW,

including Mississippi, South Carolina, Georgia, Florida, Alabama and Tennessee, and has worked with school boards within these various states, usually in response to requests by these boards or the superintendents of school districts for assistance in formulating and implementing desegregation plans. He first became involved in this case on July 15, 1969 when he attended a meeting in Mobile, Alabama, at which ten field teams were formed and sent to the defendant school districts on July 16, where they worked until July 23, gathering statistics which they took to Atlanta, having spent approximately one and one-half days in each district. A second trip was made by these teams on July 29 through August 1, 1969, during which they met with various school boards and their superintendents, asking for suggestions. These meetings involved approximately one half day in each school district. Information was taken back to Atlanta where plans were formulated and between the dates of August 7 and August 9, these HEW plans were presented to the various school boards and superintendents and thereafter filed with this Court. Although the witness made no trips to Mississippi in connection with the formulation of these plans, he did work with the review teams, asking their members various questions concerning these plans and acted in an advisory capacity. The witness was of the opinion that a unitary school system was far superior to a dual school system because all people living in an integrated society and attending school together familiarize each with the culture of the other and also helps disadvantaged students. It was his opinion that the HEW plans in question are basically sound but that sufficient time was not had for the in depth peripheral studies such as curriculum study, and financial

study required to implement these new plans. The Court finds in accordance with his testimony that these plans call for massive and substantial changes involving changes in curriculum, building renovations, including the adjusting of laboratories, and like facilities, and faculty and student preparation, including various meetings and discussions of the problems to be presented and the solutions therefor. The Court further agrees with the witness and finds that inadequate time remains between this period and the opening of school in the 1969-70 school year to accomplish a workable, smooth desegregation which is desired. This witness requested further time of Dr. Anrig, his superior in the Office of Education, but this was denied in view of the fact that the Court Order had set the time limitation. The witness was of the further opinion, and the Court so finds, that bus routes must be redrawn, teachers reassigned in accordance with their capabilities and certifications, which were not considered by HEW, classrooms will have to be converted and that there must be some meaningful educational program involving teachers and students, to prepare for the implementation of the terminal plans. This Court finds further in accordance with the testimony of this witness that the necessary delay requested would allow collaboration between the Office of Education and the defendant school districts to prepare for implementation of the terminal plans, thus resulting in better education and better community relations and consequently, an effective, workable desegregation of the defendant school districts and the conversion from a dual to a unitary system.

The second and last witness who testified in support of the Government's motion was Mr. Howard O. Sullins, of Charlottesville, Virginia, who received a B.A. degree from

Findings of Fact and Conclusions of Law of the District Court Entered August 26, 1969

Emory Henry College, and an M.A. degree in Education from Columbia University, and has completed all of his work for a doctorate in Education at the University of Virginia, with the exception of completion of his dissertation, on which he is now working. This witness has been a classroom teacher for two years, has served as principal of various high schools for a period of thirteen years, and was a superintendent of schools in Stafford County, Virginia for three years. In addition, he has been working with the United States Office of Education as Program Officer, Equal Educational Opportunities Program, Region Three, HEW, in Charlottesville, Virginia since June 15, 1968. As Program Officer, his area of responsibility is Virginia and West Virginia and involves furnishing technical assistance to school districts in the process of desegregation. This witness worked on desegregation plans in New Kent County, Virginia, Prince George County, Maryland, and various other counties in the State of Virginia. His total experience in education is approximately twenty years.

Mr. Sullins was the team leader for the team that visited, and had the responsibility of recommending desegregation in three of the defendant school districts, Hinds County, Madison County and Canton. He visited these districts during the above stated dates as team leader, talking to school boards and superintendents, as well as attorneys for the three defendant school districts. It was his opinion that the unitary school system is far superior to a dual school system; and that although adequate time was had to develop the basic plans in question, however, he strongly feels that there is insufficient time to implement these plans in order to have an effective school year in 1969-70 for the children affected, because these plans call for a massive

reorganization of school systems which takes months of planning to accomplish with required outside consultation, expert assistance, particularly to set up junior high school systems and restructuring of grades; some districts have no fixed boundary lines because of the freedom of choice system under which they have been operating and this would have to be publicized and the students and parents acquainted therewith; it would be necessary to revamp transportation systems, which takes a great deal of time; there must be adequate planning in "real troubled spots", which would involve proper training and instruction of teachers and the placing of teachers in jobs where they will be most effective; all pupils will be uprooted and entered into new schools and they must have the opportunity to learn and know what they will face, which must be done through project programs, including the meeting of student leaders of both races with each other and with teachers; the school administration will need time to rethink and redo things to properly plan the expenditures of Title I funds well in advance, which funds may be lost without proper and adequate planning, and which HEW did not have time to consider; school boards and superintendents need a program also to build communities' support for the unitary system. The witness was of the opinion and the Court finds, that in order to formulate and implement successful and effective desegregation plans, the additional time requested will be required. This witness suggested additional programs which should be undertaken to effect a smooth, workable conversion to a completely unitary school system, such as a workshop for teachers and pupils to discuss potential problems of desegregation and their solution, as was done in other districts in which

this witness worked, including some in South Carolina. These committees of students and teachers must meet with experts to obtain more knowledge on how to solve problems that will arise. The witness stated that all defendant school districts with which he dealt cooperated fully with his team but that his team was not authorized to negotiate any differences with the school boards. The first time that the defendant school districts saw the HEW plan in written form was on August 7, 1969, at which time there could be no more collaboration from HEW's standpoint, that is, there could be no further change in the HEW plan which was filed subsequently in this Court in all these school district cases.

Even if the motion of the Government for additional time had not been filed in this case with all due deference, it is extremely doubtful if this Court could have physically complied with the mandate of the United States Court of Appeals for the Fifth Circuit, because of the devastating effect of super Hurricane Camille, which this Court does not have to take judicial notice of, because it has personal and actual knowledge thereof. This deadly, gigantic "hurricane-tornado" struck not only the Mississippi Gulf Coast where the undersigned Judges reside, but also caused great damages to many other parts of the State of Mississippi, including many of the areas in which the defendant school districts are located. The storm not only resulted in many deaths, but in addition, caused considerable loss of and damage to property, disruption of communications, the complete elimination of electrical power, water and telephones to homes and offices of the undersigned Judges and many others, causing utter lack of communication and inability to travel. Not only were the undersigned Judges

Findings of Fact and Conclusions of Law of the District Court Entered August 26, 1969

deprived of electrical power and facilities with which and in which to work, but their staffs were scattered and without communication for many days and sustained considerable personal damage which required their immediate attention and care. Much more could be said about the devastation and complete destruction caused by this killer hurricane, however, it is felt that the members of the United States Court of Appeals for the Fifth Circuit, and especially the members of this panel, are completely aware of many of these factors and are sympathetic with and understand the inability of the undersigned Judges to consider and study the various plats in question, together with all other pleadings filed by the parties, to assemble a staff and equipment necessary to dictate their findings and orders, while at the same time being deeply concerned with the necessary safety and welfare of their families and the preservation of their property. In addition, many schools were destroyed or severely damaged in the coastal area, which will require the transportation or reassignment of students therefrom to other school districts, some of which are defendants herein, and various schools within the defendant school districts have sustained damage which will require transfer of students and rescheduling of classes, which will result in overcrowding and considerable confusion and chaos.

In view of all of the above, this Court finds and concludes that it has jurisdiction to consider this motion and make findings of fact thereon and suggestions and recommendations to the appropriate panel of the United States Court of Appeals for the Fifth Circuit in these cases. This Court is further of the opinion and finds, as a matter of fact and of law, that the motion filed by the Government,

joined in by the defendant school districts, is meritorious and should be granted for the foregoing reasons and for the further reasons that the granting of the requests made by the Government will, in truth and in fact, probably result in a smooth, workable conversion of the defendant school districts from a dual to a unitary system, with the elimination of the many problems of chaos and confusion referred to by the Secretary of HEW in his letter.

It is therefore the recommendation of this Court that the appropriate panel of the Court of Appeals grant the amended motion filed by the Government in all of these cases, and then adopt and enter the proposed "New Amended Order" as revised in this hearing, which was filed by the United States and attached to its Amended Motion filed here and in the Court of Appeals.

RESPECTFULLY SUBMITTED, this 26th day of August, 1969.

DAN M. RUSSELL, JR.
United States District Judge

WALTER L. NIXON, JR.
United States District Judge

APPENDIX E

Order of the Court of Appeals of August 28, 1969

[Caption omitted]

Before BROWN, *Chief Judge*, THORNBERRY and MORGAN, *Circuit Judges*.

PER CURIAM:

The United States Attorney General by motion filed with this Court on August 21, 1969, with parallel motions filed in the District Court for the Southern District of Mississippi as of the same date, requests, in effect, that this Court modify the mandate and orders heretofore entered, and, on the permission of this Court being granted, that the District Court do likewise, to extend the time for filing the terminal plans required in our order of July 3, 1969, to a date not later than December 1, 1969.

Because of the relative shortness of time and in order to permit the appeals to be heard, decided and effective action to be taken by the opening of the school term September 1969-70, this Court expedited the initial appeal from the decision of the District Court entered in May 1969. By letter-directive from the Clerk, dated June 25, 1969, we set the case for oral argument at 9:30 a.m. July 2 at New Orleans.

Paragraph 7 of that letter directive read as follows:

> 7. To enable the Court to announce a decision as quickly as possible after submission, the appellants are requested to file in 15 copies a proposed opinion order with definitive time table and provisions on the hypothesis that the appeal will be sustained. These should be modeled somewhat on the form used by the Court

Order of the Court of Appeals of August 28, 1969

in its recent opinions in *Hall, et al. v. St. Helena Parish School Board, et al.*, No. 26450, May 28, 1969, and *Davis, et al. v. Board of School Commissioners of Mobile County, et al.*, No. 26886, June 3, 1969. When and as additional opinion orders of this type are issued in other school desegregation cases, copies will be immediately transmitted to all counsel so that the parties can make appropriate comments during argument with respect to suggested modifications or changes in their proposed opinion orders.

The Court hopes that the appellants, private and government, can collaborate and submit a mutually agreeable proposed opinion order and if desires from the appellees contrary proposed orders covering separately (a) on the hypothesis that the decrees of the District Court will be affirmed, and (b) on the hypothesis that the appellants' motion and appeals will be sustained for reversal.

In response to this request of the Court several proposed decrees were supplied by one or more of the parties, including a detailed proposed opinion order submitted by the United States Attorney General on the eve of the hearing. As pointed out later, this proposed opinion order prescribed a precise timetable.

On the argument the Court heard from some 18 counsel over a period of the entire day. On the following day, July 3, 1969, the Court handed down its opinion order, which in its opening paragraph stated:

"As questions of time present such urgency as we approach the beginning of the new school year September 1969-70, the Court requested in advance of argument that the parties submit proposed opinion orders modeled after some of our recent school desegregation

cases. We have drawn freely upon these proposed opinion orders."

Both the "opinion" portion and, more specifically, the "order" portion of the opinion-order of July 3rd (see slip opinion p. 16 et seq) was substantially that proposed by the United States Attorney General in response to the Court's invitation (see paragraph 7 of letter-directive above). Except that the Court allowed approximately 10 additional days, the timetable schedule fixed by the Court was substantially that recommended by the United States Attorney General:

Paragraph of Order	*Requirement*	*Government-Proposed Date*	*Date Fixed By Court*
3	Deadline for Boards to file plan	Aug. 1	Aug. 11
4	Deadline for presenting agreed plans to Court	Aug. 1	Aug. 11
5	Deadline for HEW filing plan	Aug. 1	Aug. 11
6	Deadline for Court hearings	Aug. 13	Aug. 23
7	Deadline for Court approval of plans	Aug. 15	Aug. 27

Order of the Court of Appeals of August 28, 1969

Subsequently, on July 25, 1969, the Court on its own motion modified its July 3rd opinion-order by renumbering former paragraph 8 to be number 7 and striking from such order paragraphs 5, 6 and 7 to insert in lieu thereof new paragraphs 5 and 6 with the following resulting timetable:

New Paragraph	*Requirement*	*Revised Date fixed By Court*
5	Deadline for HEW filing plan	Aug. 11
6	Deadline for filing objections to HEW plan	Aug. 21
7	Deadline for Court order approving plan	Sept. 1

Thus it is shown that the timetable adopted was substantially that recommended by the United States Attorney General to be feasible and appropriate.

From the numerous other cases referred to in the letter directive, the Court was conscious that precise timetables were in order. Consequently, in the course of the arguments heard on July 3, 1969, the Court addressed specific questions to all counsel in the case concerning the proposed timetables. Questions were specifically directed to the Assistant Attorney General appearing on behalf of the Government. Without qualification in response to precise inquiries he affirmed the Government's view that the timetable proposed by the Government was reasonable. And, with emphasis on the Attorney General's proposed order that HEW should be called in to advise with the Boards and the District Court, he affirmed that sufficient resources

of the Executive Department would be made available to enable the Office of Education of the United States Department of Health, Education and Welfare to fulfill its role as specified in the order proposed by it and actually thereafter entered by the Court.

Except for the entry of the modification order on July 25 which moved the deadline for the effective date of the plans from August 27 to September 1, 1969, no further action has been taken by this Court. Likewise, until the motion of August 21, 1969, there has been no suggestion by the United States Attorney General that the dates fixed by the Court should be relaxed or extended or that such timetable was unattainable.

The first information that the proposed and adopted timetable was not appropriate came on August 19, 1969 when Judge John R. Brown, Chief Judge and presiding Judge of this panel, received by safehand courier the communication from the Secretary of Health, Education and Welfare dated August 19, 1969, which in turn enclosed a copy of the Secretary's communication of like date to Judges Cox, Russell and Nixon. These matters are set forth in this Court's order (with Exhibits 1 and 2) of August 20, 1969, copies of which are annexed as schedule A.

As time was so short, this Court by oral order communicated to the District Court granted full leave to the District Court to receive, consider and hear the Government's motion for extension of time to December 1, 1969. Upon the hearings to be held after notice to counsel representing all parties not later than Monday, August 25, it further requested the District Court to make its recommendations to the Court of Appeals. The District Court is to communicate its recommended decision and transmit a copy of the transcript of any evidence received at the hearings at

Order of the Court of Appeals of August 28, 1969

3. If no agreement is reached, the Office of Education shall present its proposal for a plan for the school district to the District Court on or before December 1, 1969. The parties shall have 15 days from the date such a proposed plan is filed with the District Court to file objections or suggested amendments thereto. The District Court shall hold a hearing on the proposed plan and any objections and suggested amendments thereto, and within 15 days after the time for filing objections has expired shall by order approve a plan which shall conform to constitutional standards.

4. The District Court shall enter Findings of Fact and Conclusions of Law regarding the efficacy of any plan which is approved or ordered to disestablish the dual school system in question. Jurisdiction shall be retained, however, under the teaching of Green v. County School Board of New Kent County, 1968, 391 U.S. 430, 439, 88 S.Ct. 1689, 20 L.Ed.2d 716, 724, and Raney v. Board of Education of Gould School District, 1968, 391 U.S. 443, 449, 88 S.Ct. 1967, 20 L.Ed.2d 727, 732, until it is clear that disestablishment has been achieved.

5. By October 1, 1969 the Board of Trustees in consultation with the Office of Education shall develop a program to prepare its faculty and staff for the conversion from the dual to the unitary system. The Office of Education shall report to the Court on October 1, 1969 with respect to this program. If the Board fails to develop a program, the Office of Education shall submit a program which the Court may approve unless meritorious objections supported by affidavit or other documentary evidence are made by any party.

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 632

BEATRICE ALEXANDER, ET AL., PETITIONERS

v.

HOLMES COUNTY BOARD OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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1. Following this Court's decision in *Green* v. *County School Board,* 391 U.S. 430, these cases, involving some thirty-three school districts in Mississippi, were before the United States Court of Appeals for the Fifth Circuit, in *Adams* v. *Mathews,* 403 F. 2d 181. Prior to that the district court had approved "freedom of choice" plans. In the *Adams* decision, all of these cases, and others, were reversed, and sent back to district courts to determine whether the plans would lead to "a unitary system in which racial discrimination would be eliminated root and branch," and whether the proposed changes would produce "a desegregation plan that 'promises realistically to work now'" (403 F. 2d at 188).

On remand, the district court again approved the "freedom of choice" plans (Pet. App. 1a–23a). The United States again appealed to the court of appeals, and an expedited procedure was followed in that court. The United States asked for orders which would lead to desegregation in most of the schools beginning in the fall of 1969. In the proceedings before the court of appeals, the United States stated its belief that such plans could be developed and put into effect within the time available, and the United States proposed a timetable for the development and implementation of the plans.

In these proceedings in the court of appeals, the United States also suggested that the Department of Justice was not expert in educational administration, and that better progress might be made if experienced educators from the Department of Health, Education and Welfare were brought into the picture.

The court of appeals adopted all of the recommendations of the United States (Pet. App. 28a–37a). It ordered the district court to formulate plans which would "disestablish the dual school systems in question" (Pet. App. 36a). It also ordered the district court to request "that educators from the Office of Education of the United States Department of Health, Education and Welfare collaborate with the defendant school boards in the preparation of plans" which would carry out the court's order (Pet. App. 35a-36a). Finally, it set up a timetable—admittedly a very tight one—under which plans should be presented to the district court by August 11, 1969, for hearing on August 21, 1969, and to be implemented by the district

court no later than August 25, 1969—a date which was later changed by the court of appeals to September 1, 1969 (Pet. App. 38a).

The Department of Health, Education and Welfare filed plans by August 11, 1969 (Pet. App. 40a–52a). On August 19, 1969, Robert H. Finch, Secretary of Health, Education and Welfare of the United States, sent a letter to Chief Judge Brown of the court of appeals, and to the three district judges involved in the case, requesting the court to grant an extension of time until December 1, 1969, for the filing of plans after more thorough study (Pet. App. 53a–54a). The court of appeals directed the district court to consider this request, and a motion filed by the United States based on the request, and to make recommendations with respect to it. The district court held a hearing, and recommended that the Secretary's request be granted (Pet. App. 56a–70a). This has been approved by the court of appeals, which has amended its earlier order, by eliminating the September 1, 1969, deadline, and fixing a new deadline of December 1, 1969 (Pet. App. 71a–78a). The court, at the suggestion of the Department of Justice, also ordered each of the Boards, in conjunction with the Office of Education, to "develop a program to prepare its faculty and staff for the conversion from the dual to the unitary system" and to do this by October 1, 1969 (Pet. App. 77a). Finally, also at the suggestion of the Department of Justice, the Boards were ordered not to construct any new facilities "until a terminal plan has been approved by the Court" (Pet. App. 78a).

On August 30, 1969, petitioners applied to Mr. Justice Black for an order vacating the court of appeals' modification of its previous order. On September 5, 1969, Mr. Justice Black denied the application (Pet. App. 79a–83a). The petition for a writ of certiorari followed.

2. We agree with much that is said in the petition for certiorari, and we have no quarrel with the statement in Mr. Justice Black's opinion in Chambers that "the phrase 'with all deliberate speed' should no longer have any relevancy whatsoever in enforcing the constitutional rights" of students to education in a unitary, desegregated school system (Pet. App. 81a). The United States did not rely on a concept of "deliberate speed" in seeking the extension of time granted by the court below, and there is nothing in the court of appeals decision, the district court opinion, or the motion of the United States that condones any delay past December 1, 1969, in formulating a terminal desegregation plan. Indeed, it has been, and remains, our understanding that this Court has already indicated that the "deliberate speed" formula is no longer appropriate to the remedial aspects of school desegregation suits and that, instead, school boards today are constitutionally obligated to devise and implement plans that will accomplish, both "realistically" and *"now"*, the conversion of dual, segregated school systems into unitary, desegregated school systems. *Green* v. *County School Board*, 391 U.S. 430, 438–439, and cases there cited.

While we believe that it might be useful for this

Court to reiterate these governing principles in an appropriate case, we fail to perceive what relief petitioners are seeking from this Court in the present posture of this matter. The Office of Education of the Department of Health, Education and Welfare, in its capacity as a sort of collective "Special Master" assisting the courts below, is presently proceeding, not with "deliberate speed," but with dispatch, to formulate the plans for converting the thirty-three school systems involved in these consolidated cases to unitary, desegregated systems. In compliance with the order of the court of appeals, these plans will be submitted as quickly as possible, in no event later than December 1, 1969, and will include provisions for "significant action toward disestablishment of the dual school systems during the school year September 1969–June 1970" (Pet. App. 78a).[1] It cannot now be known whether petitioners will deem any of the provisions of these plans to be unsatisfactory in any respect. If they should, they would be entitled to file their objections or suggested amendments within fifteen days of the submission of the plans to the district court and that court would be required to act thereon and approve a plan conforming to constitutional standards during the next ensuing fifteen days (Pet. App. 76a–77a). In the meantime, the Office of Education has, in compliance with the order of the

[1] The steps which might be taken during the present school year could include for example, the pairing or zoning of schools at midterm, teacher reassignments, use of team teaching, integration of athletic programs and adoption of a midterm program to prepare students and the community for total disestablishment of the dual system in the 1970–1971 school year.

court below (Pet. App. 77a), reported to that court on October 1, 1969, with respect to the program which has been developed to prepare the faculty and staff of each school district for conversion from the dual to the unitary system.

Petitioners do not claim that any of the above-described provisions of the order of the court of appeals are inappropriate in the present posture of these cases. They complain, instead, that that court erred in granting the government's request for an extension of time for the filing of the plans by the Office of Education and thereby permitting the current school year to begin in these districts under constitutionally inadequate "freedom of choice" plans. Obviously, however, the clock cannot be turned back so as to begin the school year in any other way. The pertinent question now, we submit, is not whether, in the extremely difficult circumstances of late summer, the court below should or should not have granted the extension of time deemed necessary by the Secretary of Health, Education and Welfare in order to enable his Department realistically and responsibly to make up for the tragic and frustrating default of the local school officials in these districts by doing the work which it was their obligation under the Constitution to have done.[2]

[2] Petitioners correctly state that "the school boards had made no attempt to solve [the administrative difficulties] in the fifteen years since *Brown*" (Pet. 10). Undeniably, the obligation to solve those difficulties is immediate and absolute, and the school boards involved may not profit from their own intransigence. But school systems are run for children, not boards or courts. If genuine requirements of educational administration were to be disregarded in providing the remedies for school boards' neglect of their duties, the resulting harm would fall on the very pupils for whom better education through equal opportunity is sought.

The question now is how, in the present circumstances, the overriding objective of these lawsuits, to which the United States is firmly dedicated, can be successfully and expeditiously achieved. We believe that the order of the court of appeals—formulated in the light of that court's close familiarity with these cases and distinguished experience in this field—constitutes an appropriate answer to this question. Petitioners do not suggest how the order could be improved or how, in any other respect, the objectives of these lawsuits would be furthered by this Court's review of the order at the present stage of these cases.

Accordingly, we suggest the Court should deny certiorari or, alternatively, withhold action on the petition until the situation clarifies after the scheduled filing of the plans in December.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 632+713

BEATRICE ALEXANDER, et als.,
Petitioners,

vs.

HOLMES COUNTY BOARD OF EDUCATION, et als..
Respondents.

(Including Consolidated Cases)

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, INCLUDING OBJECTIONS TO PETITION WITH MOTION TO ADVANCE, AND CROSS-PETITION FOR WRIT OF CERTIORARI WITH MOTION TO EXPEDITE HEARING

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 632

BEATRICE ALEXANDER, et als.,
Petitioners,

vs.

HOLMES COUNTY BOARD OF EDUCATION, et als.,
Respondents.

JOAN ANDERSON, et als.,
Petitioners,

vs.

UNITED STATES OF AMERICA and CANTON MUNICIPAL SCHOOL DISTRICT, et als., and MADISON COUNTY SCHOOL DISTRICT, et als.,
Respondents.

ROY LEE HARRIS, et als.,
Petitioners,

vs.

YAZOO COUNTY BOARD OF EDUCATION, et als., YAZOO CITY MUNICIPAL SEPARATE SCHOOL DISTRICT, et als., HOLLY BLUFF LINE CONSOLIDATED SCHOOL DISTRICT, et als.,
Respondents.

JOHN BARNHARDT, et als.,
Petitioners,

vs.

MERIDIAN SEPARATE SCHOOL DISTRICT, et als.,
Respondents.

DIAN HUDSON, et als.,
Petitioners,

vs.

UNITED STATES OF AMERICA and LEAKE COUNTY SCHOOL BOARD, et als.,
Respondents.

JEREMIAH BLACKWELL, JR., et als.,
Petitioners,

vs.

ISSAQUENA COUNTY BOARD OF EDUCATION, et als.,
Respondents.

CHARLES KILLINGSWORTH, et als.,
Petitioners,

vs.

ENTERPRISE CONSOLIDATED SCHOOL DISTRICT and QUITMAN CONSOLIDATED SCHOOL DISTRICT,
Respondents.

GEORGE MAGEE, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA and NORTH PIKE COUNTY CONSOLIDATED SCHOOL DISTRICT, et als.,
Respondents.

GEORGE WILLIAMS, et als.,
Petitioners,

vs.

UNITED STATES OF AMERICA and WILKINSON COUNTY SCHOOL DISTRICT, et als.,
Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, INCLUDING OBJECTIONS TO PETITION WITH MOTION TO ADVANCE, AND CROSS-PETITION FOR WRIT OF CERTIORARI WITH MOTION TO EXPEDITE HEARING

I.

OBJECTION TO MOTION TO ADVANCE AND TO THE PETITION FOR WRIT OF CERTIORARI

In accordance with the provisions of Supreme Court Rule 24.2 these Respondents object to the Petition for the Issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and the Motion to Advance filed in this cause for the following reasons:

1. *These cases are still pending before the Court of Appeals for the Fifth Circuit upon Petition for Rehearing En Banc.* Supreme Court Rule 20 is as follows:

20. Certiorari to a court of appeals before judgment. A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U.S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330; *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110; *Carter* v *Carter Coal Co.*, 298 U.S. 238; *Ex parte Quirin*, 317 U.S. 1; *United States* v. *United Mine Workers*, 330 U.S. 258; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579.

There is now pending before the Court of Appeals for the Fifth Circuit a Petition for Rehearing En Banc filed by all of these respondents and the other defendants in twenty-five consolidated cases which involve thirty-three school districts.[1] Pertinent extracts from the Petition for

1. The consolidated cases are captioned and numbered in the United States District Court for the Southern District of Mississippi as *United States* v. *Hinds County School Board, et als.*, No. 4075; *Buford A. Lee and United States, et als.*, v. *Milton Evans*, No. 2034; *United States* v. *Kemper County School Board, et als.*, No. 1373; *United States (and George Magee, Jr.)* v. *North Pike County Consolidated School District, et als.*, No. 3807; *United States* v. *Natchez Special Municipal Separate School District, et als.*, No. No. 1120; *United States* v. *Marion County School District, et als.*, No. 2178; *Joan Anderson and United States, et als.* v. *The Canton Municipal School District and The Madison County School District, et als.*, No. 3700; *United States* v. *South Pike County Consolidated School District, et als.*, No. 3984; *Beatrice Alexander, et als.* v. *Holmes County Board of Education, et als.*, No. 3779; *Roy Lee Harris, et als.* v. *The Yazoo County Board of Education, Yazoo City Municipal Separate School District and Holly Bluff Line Consolidated School District, et als.*, No. 1209; *John Barnhardt, et als.* v. *Meridian Separate School District, et als.*, No. 1300; *United States* v. *Neshoba County School District, et als.*, No. 1396; *United States* v. *Noxubee County School District, et als.*, No. 1372; *United States* v. *Lauderdale County School District, et als.*, No. 1367; *Dian Hudson and United States, et als.* v. *Leake County School Board, et als.*, No. 3382; *United States* v. *Columbia Municipal Separate School District, et als.*, No. 2199; *United States* v. *Amite County School District, et als.*, No. 3983; *United States* v. *Covington County School District, et als.*, No. 2148; *United States* v. *Lawrence County School District, et als.*, No. 2216; *Jeremiah Blackwell, Jr., et als.* v. *Issaquena County Board of Education, et als.*, No. 1096; *United States (and George Williams)* v. *Wilkinson County School Dis-*

Rehearing En Banc are attached hereto as Exhibit A and made a part hereof. A final judgment has not been entered thereon by the Court of Appeals for the Fifth Circuit.

2. *The movants and petitioners have wholly failed to make "a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court".* The recitations of the petition and the matters recited in this response demonstrate that the original Petition for Writ of Certiorari as filed is attempted to be limited solely to the timetable set up by the Court of Appeals in its judgment of July 3, 1969, as amended, which originally required certain action to be taken on or before September 1. The August 28, 1969 amendment of the judgment changed the timetable upon motion of the Attorney General of the United States acting in behalf of the United States and of the Department of Health, Education and Welfare. The Petition for Writ of Certiorari as filed attempts to exclude consideration of the merits of these cases. The change in a timetable fixed in these nine cases here clearly does not come within Rule 20. Sixteen cases are not affected. The hundreds of other school districts within the Fifth Circuit are not affected. The thousands of school districts throughout the United States are not af-

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trict, et als., No. 1160; *Charles Killingsworth, et als.* v. *The Enterprise Consolidated School District and Quitman Consolidated School District*, No. 1302; *United States* v. *Lincoln County School District, et als.*, No. 4294; *United States* v. *Philadelphia Municipal Separate School District, et als.*, No. 1368; *United States* v. *Franklin County School District, et als.*, No. 4256. The seven cases filed originally by private plaintiffs are numbered in the Court of Appeals as Cause No. 28030. The remaining nineteen cases, including the *North Pike* and *Wilkinson County* cases in which private plaintiffs were permitted to intervene, are numbered in the Court of Appeals as Cause No. 28042. None of the defendants and appellees in the suits consolidated in the Court of Appeals under Cause No. 28042 are respondents to the Petition for Writ of Certiorari other than the defendants and appellees in the cases of *United States and George Williams* v. *Wilkinson County School District* and *United States and George Magee, Jr.* v. *North Pike County Consolidated School School District.*

fected. Even these districts are affected only temporarily. No finding on the merits is included in the amendment of August 28, 1969. Yet the reasons advanced for the granting of the writ are based upon evidence alleged to have been introduced in the District Court contained in the District Court record transmitted to the Court of Appeals upon the appellate hearing of July 3, 1969.

3. *The movants and petitioners have failed to file the record as required by Supreme Court Rules 12 and 21.* It is required by Rule 21 that the petitioners file:

> . . . a transcript of the record in the case, including the proceedings in the Court whose judgment or decree is sought to be reviewed, which shall be certified by the clerk of the appropriate court or courts below. The entire record in the court to which certiorari is addressed shall be filed unless the parties agree that certified parts may be omitted as unnecessary for the determination of the Petition or the Writ, if it is granted.

The pleadings, briefs and other documents filed in the Court of Appeals and its judgment and orders form only a small part of the record in that Court. The appellate record in these cases consists of the original record in the District Court for the Southern District of Mississippi filed with the appellate court when the appeals were heard on July 3, 1969. This included a transcript of the hearings beginning October 7, 1968, and extending into December, 1968, together with all pleadings filed by the parties and other matters of record in the District Court in these consolidated cases. This transcript, together with the pleadings, plans of desegregation, reports, orders and other proceedings, became part of the record of the Court of Appeals upon the appeal heard July 3, 1969. The record was thereafter returned to the District Court for use related to the supplemental proceedings. The transcript of the hearing of August 21 and August 22, 1969, held by the District Court

by direction of the Court of Appeals, as well as the plans of desegregation filed by HEW and those filed by the school districts, the objections filed to such plans and additional reports filed in the District Court are also a part of the appellate record. All of these records are available to the petitioners under Rule 11 of the Federal Rules of Appellate Procedure:

> If the record or any part thereof is *required in the district court for use there pending the appeal,* the district court may make an order to that effect, and the clerk of the district court shall retain the record or parts thereof *subject to the request of the court of appeals,* and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow *and copies of such parts as the parties may designate.*

The movants and petitioners have made no motion in the Court of Appeals for an order that the original record in the District Court be transmitted to the Court of Appeals and by it to this Court. Hence, the said motion and petition are not sustainable under the rules of this Court.

4. *The movants and petitioners have failed to reproduce and make available to the Court copies of necessary pertinent portions of the original record in these cases.* The only "appendices" attached to the Motion and Petition consist of opinions, orders and directives of the United States Court of Appeals and the United States District Court, together with copies of two letters. *The appendix does not even include a copy of the Motion filed by the Department of Justice* in its own behalf and in behalf of the Secretary of Health, Education and Welfare. The amendment complained of was granted upon this motion.

The letter dated August 19 appearing on pages 53a and 54a of the appendix was an exhibit to such motion. The only other portion of the record reproduced and attached

by the movants and petitioners is a letter dated August 11, 1969, appearing on pages 40a through 50a of petitioners' appendix. This is one of the thirty exhibits (Tr. page 244) introduced at the hearing held by the United States District Court on August 21 and August 22 (at the request and direction of the Court of Appeals of the Fifth Circuit). This letter was introduced at page 123 of the transcript. Such transcript has not been filed with the Petition for Writ of Certiorari. However, these respondents and cross-petitioners have filed with the Clerk of this Court under Rule 21.4 a certified copy of the transcript taken on August 21 and August 22, 1969, upon the hearing of the motion by the Attorney General of the United States. Pertinent extracts therefrom are attached hereto as Exhibit B for the information of the Court.

II.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

1. Preliminary Statement

We are amazed at the lack of knowledge of the evidence displayed in the Petition for Writ of Certiorari herein filed. The writer of this brief has participated in judicial proceedings in state and federal courts in many states over a period of forty years and has never observed recitations in any petition which were such a complete departure from the facts appearing in the record.

2. Question Stated by Movants and Petitioners

In the Petition for Writ of Certiorari the petitioners state the "*Questions Presented*" as follows (numbers inserted by us for convenient reference):

> Did the Court of Appeals err in (1) *granting fourteen Mississippi school districts* (2) *an indefinite delay* (3) *in implementing* school desegregation plans (4)

based upon generalized representations by the United States Department of Health, Education and Welfare that delay was necessary (5) *for preparation of the communities*?

Each phrase underlined by us is a clear misconstruction of the evidence and proceedings contained in this record. We call the Court's attention to the following phrases:

(1) *"Granting fourteen Mississippi school districts"*. To the contrary the motion was made by the Department of Justice in behalf of the United States and of the Secretary of Health, Education and Welfare, a copy of such motion being attached hereto as Exhibit C. Additional time was granted *to the Office of Education of the Department of Health, Education and Welfare* (acting in conjunction with the school districts) to *"develop and present* to the District Court on or before December 1, 1969, *acceptable plans of desegregation"*. This was done upon motion filed by the Attorney General in behalf of the United States and as attorney for the Secretary of Health, Education and Welfare. The new timetable was not initiated by any of the defendants: It was stipulated of record by the attorneys for the private plaintiffs as follows (Exhibit B hereto, pp. 21e-22e):

> BY MR. SATTERFIELD: May I further inquire of counsel for the individual Plaintiffs, by the filing of this objection as entitled, as I understand, it is intended at least to be applicable to all cases in which they are individual plaintiffs. Does counsel file this objection recognizing that the motion made by the Department of Justice on behalf of the Secretary and of the United States, does apply to those seven cases with a possibility of the addition of two more?
>
> BY MR. AMAKER: Well, we recognize that, yes.

As stated in Note 1 of the Petition, the private plaintiffs filed seven suits and were permitted, at the August 21, 1969, hearing, to intervene in two additional cases.

The Secretary of Health, Education and Welfare was directed by the Court to file on August 11, 1969, plans of desegregation in all of the twenty-five consolidated cases. *The Secretary did file original plans in each case.* See testimony of Mr. Jordan, pertinent portions of which are included in Exhibit B hereto. The school districts also filed differing plans on August 11, 1969. Agreement not having been reached largely due to press of time, the school districts also filed objection to the HEW plans on August 21, 1969.

It being impossible to resolve the differences before the timetable deadline of September 1, 1969, either by negotiation or by hearings affecting the thirty-three districts, the Attorney General of the United States filed his motion. The school boards simply joined in the motion made in behalf of the Secretary of Health, Education and Welfare. A copy of such joinder is attached hereto as Exhibit D. It was stipulated by individual plaintiffs that the motion filed by the Attorney General of the United States was applicable to these nine cases.

(2) "*An indefinite delay*". There was nothing indefinite about the delay granted. The change in the timetable requested by the Secretary of Health, Education and Welfare was granted to permit it (in conjunction with the school districts) to develop and present to the District Court on or before December 1, 1969, acceptable plans of desegregation. The next step required was approval by the District Court unless objections were filed within fifteen days. The District Court was then required to hold a hearing within fifteen days after objections were filed to enter findings of fact and conclusions of law in each case. In addition, October 1, 1969, was set as the limit for the filing of a program developed by the Office of Education and the boards "to prepare its faculty and staff for conversion from

the dual to the unitary system". In general, this schedule has been met and programs have been filed approved by both HEW and the several school districts. The schedule also included the following requirement (Petition page 78a):

> It is a condition of this extension of time that the plan as submitted and the plan as finally approved shall require significant action toward disestablishment of the dual school systems during the school year September 1969-June 1970.

(3) *"Based upon generalized representations by the United States Department of Health, Education and Welfare"*. We have filed with the Clerk of this Court under Supreme Court Rule 21.4 a transcript of the entire testimony taken August 21 and 22, 1969, at the hearing held at the direction of the Court of Appeals. The testimony of Mr. Jordan, head of the Atlanta Regional Office of the Department of Education, was particularly specific and detailed as hereinafter discussed. It pointed out the reasons why *it had not been possible for HEW to develop full, complete and satisfactory plans* nor to prepare for the implementation thereof.

(4) *"That delay was necessary for preparation of the communities"*. This is contrary to the facts. This time was granted for the reasons advanced by Mr. Finch, Secretary of Health, Education and Welfare, in his letter to Honorable John Brown, Chief Judge of the Court of Appeals of the Fifth Circuit. Such letter (Petitioners' Appendix, pp. 53a and 54a) was attached as an exhibit to the Motion by the Attorney General of the United States and made a part thereof by reference (Exhibit C hereto). Mr. Finch's statements thus became allegations of the motion upon which the Court of Appeals based its action:

> On Thursday of last week, I received the terminal plans as developed and filed by the experts from the

Office of Education. *I have personally reviewed each of these plans.* This review was conducted in my capacity as Secretary of the Department of Health, Education and Welfare and as the Cabinet officer of our government charged with the ultimate responsibility for the education of the people of our Nation.

In this same capacity, and bearing in mind the great trust reposed in me, together with the ultimate responsibility for the education of the people of our Nation, *I am gravely concerned that the time allowed for the development of these terminal plans has been much too short for the educators of the Office of Education to develop terminal plans* which can be implemented this year. The administrative and logistical difficulties which must be encountered and met in the terribly short space of time remaining must surely in my judgment, produce chaos, confusion and a catastrophic educational setback to the 135,700 children, black and white alike, who must look to the 222 schools of these 33 Mississippi districts for their only available educational opportunity.

I request the Court to consider with me the shortness of time involved and the administrative difficulties which lie ahead and permit additional time during which experts of the Office of Education may go into each district *and develop meaningful studies in depth and recommend terminal plans to be submitted to the Court not later than December 1, 1969.*

The motion was not for the purpose of preparing communities for acceptance of plans. *It was to allow time for the development of terminal plans based upon meaningful studies in depth.* It was to give the Secretary of Health, Education and Welfare sufficient time, after proper studies and in collaboration with the school districts, to recommend terminal plans to be submitted to the Court not later than December 1, 1969. The "preparation of the communities" is only incidental to the implementation of sound and proper plans.

Honorable John Leonard, Assistant Attorney General of the United States, Civil Rights Division, stated the position of the United States and the Secretary of Health, Education and Welfare as follows (Exhibit B hereto, pp. 22e-23e):

> I think it is also safe to say that most of the school boards did cooperate in that at least information was provided and the educators were received by the colleagues in the district and were able to draw and pull together the information necessary to provide some kind of a plan.
>
> I think, however, that it became obvious to the Secretary of Health, Education and Welfare that as the time pressure was building here both with respect to the field work that needed to be done, the investigation by his people, out in the field, in the districts, that it soon became apparent to him that in order to have, in fact, an orderly movement from a dual to a unitary system, in order to accomplish in fact what we believe the Supreme Court seeks, that is a plan that works, one that is going to accomplish the objectives, *both with respect to the development of the plans and with respect to the implementation of those plans, that the time was simply too short.*
>
> Now, I would be less than candid if I didn't say that the Government was somewhat embarrassed by this because we gave the Fifth Circuit some assurance that there was time but we are lawyers, not educators, and it is the educational judgment it seems to me, that's important here. These are the men who are trained to educate our children. They are the ones that have to make the administrative and the educational decisions that go with bringing about not just a unitary system but a plan for education in the framework of elimination of racial discrimination that's going to, in fact, result in quality education.

Mr. Jesse J. Jordan, Senior Program Officer of the United States Office of Education, Atlanta, Georgia (who

was in charge of development of all the plans of desegregation for HEW for the thirty-three districts included in the twenty-five consolidated cases), testified (Exhibit B hereto, p. 30e):

> Q. Back to the plans Mr. Jordan, with respect to the time frame in which they were developed. Do you have an opinion as to whether or not that time frame had any effect on the validity of the plans themselves?
>
> A. I think probably the plans themselves were sound; however, my personal belief in developing plans of this nature, it is necessary to do a number of curriculum studies which time did not allow for. Curricular was not examined at all, finance, no financial studies were made, no social or economic study was made to determine the needs of any given district, *and if these studies were made, you probably will come up with a superior plan than just a purely segregated plan. You would come up with a plan for educational change for which the desegregated is a part. . . .*

3. Question Actually Presented by Motion and Petition

Shall this Court reverse the finding of fact and law by the Court of Appeals affirming the findings of the District Court that the Secretary of Health, Education and Welfare, the United States and the local school boards required and should be granted sufficient time to develop reasonable and satisfactory plans of desegregation within a definite time schedule?

The nine captioned cases are pending in the United States District Court for the Southern District of Mississippi. All were included in the twenty-five cases consolidated in the District Court for the original hearing and later consolidated upon appeal by the Court of Appeals of the Fifth Circuit under Docket Nos. 28030 and 28042. These cases generally are referred to as *U.S.A.* v. *Hinds County*

Board et als. Originally, the captioned cases were consolidated with thirty-five other cases from various district courts and heard by the Court of Appeals upon motion to set aside District Court docket entries. They were captioned *Adams* v. *Mathews,* 403 F.2d 181 (5th Cir. 1968).

All twenty-five of the consolidated cases were included in the judgment and opinion of the Court of Appeals dated July 3, 1969 (Petitioners' Appendix B, p. 28a), as amended by order dated July 25, 1969 (Petitioners' Appendix B, p. 38a), the Findings of Fact and Conclusions of Law by the District Court dated August 26, 1969 (Petitioners' Appendix D, p. 56a), and also order adopted by the Court of Appeals of the Fifth Circuit on August 28, 1969, amending the judgment of July 3, 1969 (Petitioners' Appendix D, p. 71a).

The judgment and mandate of the Court of Appeals dated July 3, as amended on July 25, reversed the action of the District Court which had found that the plans adopted by each school board under *Jefferson*-type decrees were operating in conformity with the teachings of *Green, Monroe* and *Raney.* The judgment and mandate did not approve any plan but set up a time schedule ending September 1, 1969, for formulation, submission and approval of such plans. The mandate required a hearing on such plans by the District Court and the adoption of a plan conforming to Constitutional standards, all to be accomplished on or before September 1, 1969.

As set out in the "Findings of Fact and Conclusions of Law by the District Court" (Petitioners' Appendix D, p. 56a), the Attorney General on behalf of the United States and the Secretary of Health, Education and Welfare, introduced evidence demonstrating that it was impossible for the original schedule to be met. The Findings of Fact by the District Court were affirmed by the Court of Appeals.

4. The Divergent Plans of Desegregation Filed by HEW and the School Districts Have Not Been Considered or Approved by Either the District Court or the Court of Appeals

No new plan of desegregation for any one of the districts involved in the twenty-five consolidated cases has been considered by either the District Court or the Court of Appeals. The Secretary of Health, Education and Welfare filed in the Court of Appeals a formal motion (Exhibit C hereto, p. 35e) with his letter attached (supported by the evidence in this proceeding). He requested time to develop and present to the District Court on or before December 1, 1969, acceptable plans of desegregation. The defendant districts filed proposed plans on or about August 11, 1969, reserving all of their rights under the pending Motion for Rehearing En Banc, their rights to file Petition for Writ of Certiorari, and other procedural rights. They alleged in their joinder in the motion of the Attorney General that it was "impossible to work out a plan satisfactory to either the Court, the defendants or the plaintiff" in the time allowed (Exhibit D hereto, p. 43e).

No hearing has been had by either the District Court or the Court of Appeals upon the merits of any plan of desegregation. Hence, if the Motion and Petition are granted, the new plans to be filed by the Secretary of Health, Education and Welfare after full and complete investigation, study in depth, and consultation with the school districts, will not be before the Court; the original plans filed by the Secretary have not been considered by either the District Court or the Court of Appeals. The plans filed by the school districts have not been considered by the District Court or the Court of Appeals. There is nothing to be put into effect in these school districts under the teachings of *Brown, Green, Monroe* and *Raney*.

If the Motion and Petition are granted, it would simply reinstate an impossible time schedule, deny the Secretary of Health, Education and Welfare and the Department of Justice an opportunity to carry out the procedures outlined in the motion and evidence presented by them and deny the school districts both a hearing by the District Court and the opportunity to collaborate with HEW in developing terminal plans.

5. Statement of Facts

A. *The Court of Appeals proceeded in these cases with all possible dispatch.* All districts have been operating under model Jefferson decrees and were in compliance with such decrees. After the decision in *Green,* plaintiffs filed motions in the District Court for supplemental relief, seeking the formulation and implementation of desegregation plans other than freedom-of-choice. The District Court found that these school districts were in compliance with *Green* and denied these motions by order entered on or about May 16, 1969 (Appendix D to Petition, pp. 1a-22a). After notices of appeal and preliminary steps the following transpired:

(1) *On June 23, 1969,* the United States of America filed Motion for Summary Reversal and Motion to Consolidate Appeals.

(2) *On June 23, 1969,* the Clerk of the Court of Appeals mailed a letter stating the motion of the United States of America would be presented on July 3, together with any response filed prior to that date by opposing counsel.

(3) *On June 25, 1969,* the Court of Appeals issued a directive to counsel of record (Appendix B to Petition, p. 24a) that the Court would hear oral argument on these cases "on motion for summary reversal and *the merits* in all of the cases".

(All emphasis in this response is ours unless otherwise indicated.) This directed that the argument would be held in New Orleans beginning at 9:30 A.M., July 2, 1969, and any memoranda or responses must be filed with the Clerk by noon, July 1, 1969. The letter further recited the Court had taken notice of the District Court's order with respect to the record; but, since appeal was being expedited on the original record, the United States Attorney should make arrangements with the District Clerk to transmit to the Clerk of the Court of Appeals the entire record of the District Court so that the same would be available to the Court if needed during the argument and summation. It was further stated that the Court recognized that "this is a huge record involving a large number of parties and matters of great public interest and importance". *This letter was received by counsel on June 25 and June 26.*

(4) The directive of the Court of Appeals contained the following finding by the Court (Appendix B to the Petition, p. 26a):

> 6. The Court's general approach will be to *accept the fact findings of the District Court* and to determine what, if any, legal relief is now required based thereon. *To the extent that appellants, private or government, assert that any one or more specific fact findings* (as distinguished from mixed questions of law and fact) *are clearly erroneous, the appellants concerned shall xerox copies of pertinent excerpts of the transcript of the evidence* for use by the Judges (4 copies) which may be made available during argument.

No party filed xerox copies of pertinent excerpts from the record asserting that any findings of fact of the District Court were erroneous.

(5) *On July 2, 1969,* oral argument was presented and was concluded before the Court adjourned for lunch.

(6) *On July 3, 1969,* the judgment of the Court of Appeals was entered. It was amended, ex mero motu, July 25, 1969.

B. *The schedule provided in the Appeals Court Order of July 3 (as amended July 25) required immediate action, without time for study by HEW or collaboration with the school districts.*

The Appeals Court Order of July 3 (later amended on July 25) provided (Appendix B to Petition, pp. 28a and 38a):

(1) The District Court should forthwith request that educators from HEW collaborate with the defendant school boards in the preparation of plans to disestablish the dual school systems in question (the District Court so ordered on July 5, 1969).

(2) Each board and HEW should present to the District Court before August 11 an acceptable plan of desegregation for each district.

(3) If an agreed plan was submitted by a board and HEW on August 11, the plan would be approved unless within seven days a party filed objections grounded on Constitutional standards.

(4) If no agreement was reached, HEW should file its plan by August 11 and the parties would have ten days within which to file objections or suggested amendments. The District Court would hold a hearing and enter a plan by August 31 which conformed to Constitutional standards.

(5) A plan for each school district was required to be entered not later than September 1, 1969, to be effective for the beginning of the 1969-70 school year.

On July 15, pursuant to this expedited plan of action, educators employed by HEW met at Mobile, Alabama, to plan their collaboration with the thirty-three districts embraced in the orders of the Court of Appeals and the District Court (Exhibit B, pp. 27e-28e).

C. *The timetable fixed by the Court of Appeals (upon recommendation of the Department of Justice) when placed in operation was found by HEW to be impossible of effective execution.*

Jessie J. Jordan is an experienced educator who believes a unitary school system is superior to a dual school system. He is Senior Program Officer for Title Four in the United States Office of Education in the Atlanta region and coordinated the overall effort of planning for the thirty-three Mississippi school districts and reviewed all of the plans. (Exhibit B hereto, pp. 25e-26e).

Between July 16 and July 23 these teams made their first trip into Mississippi. Mr. Jordan testified that on this first trip ". . . the teams gathered statistical information on enrollment, certain building information, pupil location maps where available, school location maps, visitation of schools and tried to get a general feeling and input from the school system." (Exhibit B, p. 28e).

On July 23, all teams returned to Atlanta and worked on ". . . trying to put together some tentative recommendation for the school system." (Exhibit B, p. 28e).

Between July 29 and extending through August 1, the teams made a second trip into Mississippi. Mr. Jordan

said: "On this trip the teams met with the school systems the second time to present some of their recommendations and to try to get input from the school systems." (Exhibit B, p. 28e).

From August 2 through August 6, all teams were in Atlanta formalizing the plans upon which they were working. Mr. Jordan testified:

> After they had been formalized, duplicated and so forth, a third trip was made into Mississippi from the 7th through the 9th at which time the plans were formally presented to the superintendent or the board or whoever the superintendent wished present.

On August 11 such HEW plans were filed with the Court. Mr. Jordan further testified:

> The teams were working on a very tight schedule and each team had to, depending on the size of the school system, had from two to six districts to cover which meant, I believe, I'm not absolutely positive of this, but I would say that the average time in a school district on the first visit was a day and a half. The average on the second visit, maybe a half a day.

Because of the lack of time to confer and collaborate, none of the thirty-three defendant districts reached an agreement with HEW.

On August 11 each defendant district also filed a separate plan with the District Court.

Prior to August 19, Mr. Jordan reported voluntarily and on his own initiative by telephone to his superior, Dr. Anrig, that in his expert judgment more time was required for development and implementation of plans for desegregation in the subject school districts.

On or before August 21, the districts filed objections to the plans of HEW and attached affidavits containing testimony supporting their own plans and criticizing the plans of HEW. No objections to the school district plans were thus filed by the plaintiff or intervenors.

On August 26, after the hearings held August 21 and 22, the District Court filed its Findings of Fact and Conclusions of Law and recommended that the Court of Appeals grant the relief sought by the United States of America (Appendix to the Petition, p. 56a).

On August 28 the Court of Appeals affirmed the Finding of Fact and Conclusions of Law of the District Court, after considering the record of the August 21st hearing and in light of the full record in these cases. It sustained the motion of the United States of America and amended its previous judgment as herein above set forth (Petitioners' Appendix, p. 71a).

In addition to Findings of Fact based upon the testimony of Mr. Jordan, the District Court found as follows upon the testimony of Mr. Howard O. Sulling, another witness for the United States and Program Officer for the United States Office of Education in Atlanta (Petitioners' Appendix D, pages 67a-68a):

> The witness was of the opinion and the Court finds, *that in order to formulate and implement successful and effective desegregation plans, the additional time requested will be required.* This witness suggested additional programs which should be undertaken to effect a smooth, workable conversion to a completely unitary school system, such as a workshop for teachers and pupils to discuss potential problems of desegregation and their solution, as was done in other districts in which this witness worked, including some in South Carolina. These committees of students and teachers must meet with experts to obtain more

knowledge on how to solve problems that will arise. *The witness stated that all defendant school districts with which he dealt cooperated fully with his team but that his team was not authorized to negotiate any differences with the school boards.* The first time that the defendant school districts saw the HEW plan in written form was on August 7, 1969, at which time there could be no more collaboration from HEW's standpoint, that is, there could be no further change in the HEW plan which was filed subsequently in this Court in all these school district cases.

Even if the motion of the Government for additional time had not been filed in this case with all due deference, it is extremely doubtful if this Court could have physically complied with the mandate of the United States Court of Appeals for the Fifth Circuit, because of the devastating effect of super Hurricane Camille, which this Court does not have to take judicial notice of, because it has personal and actual knowledge thereof. This deadly, gigantic "hurricane-tornado" struck not only the Mississippi Gulf Coast where the undersigned Judges reside, but also caused great damages to many other parts of the State of Mississippi, including many of the areas in which the defendant school districts are located.

We embody in this Response by reference the detailed refutation of erroneous and unfounded statements in the original Petition which we set forth in the Cross-Petition for Writ of Certiorari.

6. The Order Entered by the Court of Appeals on August 28th Is Based upon a Finding of Fact, Supported by the Record, Made by Both the District Court and Court of Appeals, and Should Not Be Disturbed.

As set out above, the amendment of August 28 permits the consideration by the District Court of new plans developed by HEW and the school districts during the period

from August 31 to December 31st. At the same time, the Court required: (1) a program of faculty orientation for conversion from a dual to a unitary system to be adopted by October 1; (2) further study for better plans and more efficient implementation; (3) additional joint study by HEW and local boards looking toward improvement of and agreed plans of desegregation; and (4) a condition that plans submitted and approved call for significant actions to disestablish the dual school system during the September 1969-June 1970 school year.

Upon the evidence, including the testimony of experts presented by the United States, the District Court found (Petitioners' Appendix, p. 69a):

> In view of all of the above, this Court finds and concludes that it has jurisdiction to consider this motion and make findings of fact thereon and suggestions and recommendations to the appropriate panel of the United States Court of Appeals for the Fifth Circuit in these cases. This Court is further of the opinion and finds, as a matter of fact and of law, that the motion filed by the Government, joined in by the defendant school districts, is meritorious and should be granted for the foregoing reasons and for the further reasons that the granting of the requests made by the Government will, in truth and in fact, probably result in a smooth, workable conversion of the defendant school districts from a dual to a unitary system, with the elimination of the many problems of chaos and confusion referred to by the Secretary of HEW in his letter.
>
> It is therefore the recommendation of this Court that the appropriate panel of the Court of Appeals grant the amended motion filed by the Government in all of these cases, and then adopt and enter the proposed "New Amended Order" as revised in this hearing, which was filed by the United States and attached to its Amended Motion filed here and in the Court of Appeals.

The Court of Appeals reached a similar factual conclusion as follows (Petitioners' Appendix, p. 76a):

> Following this the Court has received and considered the findings of fact, conclusions of law and recommendations of the District Court, the record of the hearings, and the briefs and arguments of counsel, pro and con. On the basis of the matter set forth herein, the Court amends its order further as follows: [Here follows the amendment of August 28.]

The present petition seeks to vacate the August 28th amendment of the judgment, even though the District Court and the Court of Appeals have found as a fact that action upon the time schedule previously fixed would produce chaos, confusion and a catastrophic educational setback to the 135,700 children, black and white alike, who must look to the 222 schools of these 33 Mississippi districts for their only available educational opportunity. We respectfully submit that this is not required by *Brown* v. *Board of Education*, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, by *Green* v. *County School Board*, 1968, 391 U.S. 430.

The Supreme Court has consistently declined to take such action. *The Linseed King*, 1932, 52 S.Ct. 450, 285 U.S. 502, 76 L.Ed. 903; *J. I. Case Co.* v. *Borak*, 1964, 84 S.Ct. 1554, 377 U.S. 426, 12 L.Ed. 423; *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 1950, 71 S.Ct. 127, 340 U.S. 147, 95 L.Ed. 162; *Berenyi* v. *District Director*, 1967, 87 S.Ct. 666, 385 U.S. 630, 17 L.Ed. 656. In *Meredith* v. *Fair*, supra, Mr. Justice Black said:

> I further agree with the Court of Appeals that there is very little likelihood that this Court will grant certiorari to review the judgment of the Court of Appeals, *which essentially involves only factual issues.* (9 L.Ed.2d, p. 44).

The Supreme Court is reluctant to interfere with factual decisions of the lower Courts. *United States Alkali Export Ass'n* v. *United States*, 1945, 325 U.S. 196, 89 L.Ed. 1554. In *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Commission*, 1922, 67 L.Ed. 217, the Supreme Court said:

> But the court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits, and therefore, is familiar with the record. (67 L.Ed., p. 224).

The action desired, if the present petition is granted, is easily distinguishable from that in *Lucy* v. *Adams*, supra, wherein the Supreme Court was asked to implement the findings of fact of the District Court (134 F.Supp. 235). In so doing the Supreme Court was not called upon to reverse or set aside the findings of fact of the lower Court, as would be the case if the present motion were granted.

To the contrary, this matter falls within the teaching of *Brown* v. *Board of Education*, supra, *Cooper* v. *Aaron*, 1958, 358 U.S. 1, and *Green* v. *County School Board*, supra, that the District Courts can best perform the necessary judicial appraisal for the implementation of desegregation of schools.

7. Vacating the Amendment of August 28th Will Accomplish No Appreciable Expedition of Action in These School Suits and Would Be Detrimental to the Interest of All Students

If the mandate which was in effect prior to August 28th were to be reinstated at this time, the original timetable would have to be revised to permit the District Court to carry out its function. All that could be gained from reinstating such mandate would be a hurried entry at some future date of partially completed and admittedly

inadequate plans, which future date might approach closely the December 1st to December 31st dates set in the amendment of August 28th. However, such order specifically requires "significant action toward disestablishment of the dual school system during the school year September, 1969-June, 1970."

The effect of reinstating the earlier order of the Court of Appeals would be to direct the District Court to hold hearings for each district and to enter new plans for desegregation (under whatever new timetable the Court of Appeals would deem appropriate). The only plans before the District Court are those submitted by HEW and those submitted by the school districts. The District Court is now confronted with the opinion of Secretary Finch that the plans HEW prepared should not be entered or implemented at this time, as the Secretary stated:

> I am gravely concerned that the time allowed for the development of these terminal plans has been much too short for the educators of the Office of Education to develop terminal plans which can be implemented this year. The administrative and logistical difficulties which must be encountered and met in the terribly short space of time remaining must surely in my judgment, produce chaos, confusion, and a catastrophic educational setback to the 135,700 children, black and white alike, who must look to the 222 schools of these 33 Mississippi districts for their only available educational opportunity.

8. The Petition for Writ of Certiorari Being Directed to the Amendment of a Judgment, the Same Should Be Dismissed or, in the Alternative, Granted As Being Applicable to the Entire Judgment

Under the statutes and the rules of this Court, a Writ of Certiorari will not lie to review the amendment of a judgment entered by a Court of Appeals. The statutes

were adopted and the rules were promulgated to permit the review of any *judgment* of a Court of Appeals. A piecemeal review of one or more amendments to a judgment cannot be sustained. Hence, this Petition for Writ of Certiorari should either be dismissed, or, in the alternative, should be construed to be a petition to bring before this Court the entire judgment entered on July 3, 1969, including the amendments of July 25, 1969 and August 28, 1969, together with all matters therein involved.

As will be set forth in the Cross-Petition for Writ of Certiorari herein filed, if such review is granted these respondents and cross-petitioners will move for an expedited hearing consistent with the full record being filed with this Court, sufficient time being allowed for preparation of appropriate appendices, and for full, complete and proper briefs by all parties.

For the foregoing reasons the respondents respectfully submit that their objections to the Petition for Writ of Certiorari herein filed and the Motion to Advance the same should be sustained and both such Petition and Motion should be denied.

III.

CROSS-PETITION FOR WRIT OF CERTIORARI

And now having fully responded to and answered the Petition for Writ of Certiorari herein filed and the Motion to Advance the same, all of the respondents named in the caption hereto (other than the United States of America) file this, their Cross-Petition for Writ of Certiorari under Rule 21 of the Rules of this Court against the Petitioners and the United States of America, subject to the reservation of rights hereinafter set forth. Cross-Petitioners adopt all of the allegations above set forth in their Response and make such allegations a part hereof by reference.

Cross-Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 3, 1969, as modified by order dated July 25, 1969, and by order dated August 28, 1969. Said judgment of the Court of Appeals of the Fifth Circuit is the same judgment which is the subject of the Petition for Writ of Certiorari filed by the Petitioners.

1. Judgment and Opinion Below

The original judgment with the opinion appended thereto was rendered on July 3, 1969 (Petitioners' Appendix B, page 28a). Said judgment has been amended by order entered by the said court on July 25, 1969 and later amended by order entered by the said court on August 28, 1969. Neither of said orders has been reported. As copies of the said judgment and the said amendments are attached to the Petition for Writ of Certiorari herein filed, the same are embodied herein by reference and copies are not attached to this Cross-Petition for Writ of Certiorari, under the provisions of Supreme Court Rule 21.

2. Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered on July 3, 1969. Opinion and mandate were issued on that date. Such judgment was amended by order entered July 25, 1969 and by order entered August 28, 1969. Petition for Rehearing En Banc was filed in the said Court of Appeals in accordance with and within the time limited by the Federal Rules of Appellate Procedure, having been filed on July 16, 1969.

Petition for Rehearing En Banc is still pending and undisposed of by the said Court of Appeals. A copy of

said Petition for Rehearing En Banc is a part of this record in the Supreme Court and pertinent extracts therefrom have been attached as Exhibit A to the above Response filed herein by these Cross-Petitioners. Said Petition for Rehearing is made a part hereof by reference.

Jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. § 1254 (1).

3. Reservation of Rights

The Cross-Petitioners reserve their objections filed to the original Petition for Writ of Certiorari and to the Motion to Advance the same. This Cross-Petition for Writ of Certiorari is filed to protect the rights of Cross-Petitioners and to assure that if a Writ of Certiorari is issued it will bring the entire matter before this Court as distinguished from one amendment to one portion of the judgment of the Court of Appeals. It is also filed taking cognizance of the fact that the Petition for Rehearing En Banc is under consideration by the Court of Appeals of the Fifth Circuit and that should such Petition be overruled during the pendency of this proceeding, Rule 20 would become inapplicable as of that date. The Cross-Petitioners further reserve their objection to the original Petition for Writ of Certiorari on the ground that it attempts to obtain a review of an amendment to a judgment and not of the entire judgment. It can only be sustained if construed to be a Petition for Writ of Certiorari to review the judgment of July 3, 1969, as amended on July 25, 1969 and August 28, 1969.

4. Questions Presented for Review

(1) Is a freedom of choice plan a proper vehicle to set up and maintain schools conforming to all Constitutional guarantees, where such plan is properly formulated

complying with all requirements laid down by the courts, administered fairly and without discrimination, and which permits truly free and uninfluenced choice by students and their parents? If so, what are the vestiges of a dual system which must be eradicated in order to maintain a freedom of choice plan?

(2) Do the decisions of the Court of Appeals of the Fifth Circuit construing, implementing and broadening *Jefferson I* and *Jefferson II*, or any other decisions thereof applying Section 1 of the Fourteenth Amendment to the administration of public schools, conflict with the decisions of other Courts of Appeal on the same question?

(3) Does Section 1 of the Fourteenth Amendment require enforced integration of the public schools as distinguished from prohibiting enforced segregation thereof to the extent that any plan is unconstitutional under which there are schools composed of students of only the Negro race, *or* only a small fraction of Negroes are enrolled in formerly white schools, *or* there are schools with faculties composed chiefly of teachers of one race?

(4) Has the Court of Appeals of the Fifth Circuit in *Hinds County* and other cases announced by various panels applied Section 1 of the Fourteenth Amendment to the administration of public schools so that it has decided a Federal question in a way which conflicts with applicable decisions of this Court, or so as to determine important questions of Federal law which have not been, but should be, settled by this Court?

(5) Have the Cross-Petitioners been accorded due process of law or did the Court of Appeals of the Fifth Circuit err in reversing and remanding the consolidated cases in *Hinds County* without an opportunity for the

record to be considered, for full briefs to be filed, and for the Court to consider the differing local situations and differing attainments in the districts involved?

5. Constitutional Provisions and Statutes Involved.

The following are the Constitutional provisions and statutes involved with citation of the volume and page where they may be found in the official edition:

Fourteenth Amendment to the Constitution of the United States,

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CIVIL RIGHTS ACT OF 1964, SUBCHAPTER IV.
PUBLIC EDUCATION

Section 401(b) of the Civil Rights Act of 1964, being Pub.L. 88-352, Title IV, § 401, July 2, 1964, 78 Stat. 246, and appearing as Title 42, Section 2000c-(b), U.S.C.A.:

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

Section 410 of the Civil Rights Act of 1964, being Pub. L. 88-352, Title IV, § 410, July 2, 1964, 78 Stat. 249, and appearing as Title 42, Section 2000c-9, U.S.C.A.:

> Nothing in this subchapter shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.

Section 407 of the Civil Rights Act of 1964, being Pub. L. 88-352, Title IV, § 408, July 2, 1964, 78 Stat. 249, appearing as Title 42, Section 2000c-6(a), U.S.C.A.:

> . . . provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

CIVIL RIGHTS ACT OF 1964, SUBCHAPTER V. FEDERALLY ASSISTED PROGRAMS

Section 604 of the Civil Rights Act of 1964, being Pub.L. 88-352, Title VI, § 604, July 2, 1964, 78 Stat. 253, and appearing as Title 42, § 2000d-3, U.S.C.A.:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

CIVIL RIGHTS ACT OF 1964, SUBCHAPTER VI. EQUAL EMPLOYMENT OPPORTUNITIES

Section 702 of the Civil Rights Act of 1964, being Pub.L. 88-352, Title VII, § 702, July 2, 1964, 78 Stat. 255, and appearing as Title 42, Section 2000e-1, U.S.C.A.:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities *or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.*

In addition to the above statutes directly applicable to these suits, the Congressional intent concerning these matters has been expressed repeatedly since 1964. An illustration thereof is Public Law 90-557, 82 Stat. 969, which included the current appropriations for the Departments of Health, Education and Welfare and Labor. The section relating to elementary and secondary education, containing the following clear prohibition is as follows:

> No part of the funds contained in this Act may be used to force bussing of students, abolishment of any school or to force any student attending any elementary or secondary school to attend a particular school against the choice of his or her parents or parent in order to overcome racial imbalance.

6. Preliminary Statement

Due to the limited time involved it has been impossible to obtain and file with the Clerk of this Court a transcript of the entire record of these nine consolidated cases, which the original Petitioners failed to do. However, for the purposes of this Response and Cross-Petition, we have filed under Rule 21.4 transcripts and other portions of the record originally made in the District Court necessary to give this Court a full understanding of the necessity of a full review of the entire record upon which the judgment of July 3, 1969, as amended, is based, which, upon appeal, be-

came a part of the record of the Court of Appeals. These portions of the record are illustrative of the facts proved in the District Court and involved in the judgment of the District Court dated May 16, 1969, and of the Court of Appeals rendered July 3, 1969.

We have chosen the transcript of proceedings in three typical cases:

(1) *John Barnhardt, et als.* v. *Meridian Separate School District, et als.*, Civil Action No. 1300. Meridian is the largest school district among the fourteen included in the nine suits now before this Court. See Note 1 on pages 2 and 3 of the Petition for a listing of these districts, in addition to the listing contained in the caption of this pleading.

(2) *Charles Killingsworth* v. *The Enterprise Consolidated School District*, Civil Action No. 1302, which is one of the smallest school districts now before this Court.

(3) *Roy Lee Harris, et als.* v. *Yazoo County Board of Education, Yazoo City Separate Municipal School District and Holly Bluff Line Consolidated School District*, Civil Action No. 1209. These districts are about the average size of those now before this Court.

(4) *United States* v. *Hinds County School Board, et als.*, Civil Action No. 4075. Under the consolidation of the twenty-five cases, the testimony of the educators and experts in the *Hinds County* case was adopted by and became a part of the record of the remaining twenty-four cases.

(5) We also discuss the facts appearing in the record of the United States District Court and the Court of Appeals for the Fifth Circuit in the suit of *United States* v. *Natchez Special Municipal School District, et als.* This

suit is not before this Court but it is typical of many of the other school districts not involved in the Petition for Writ of Certiorari. It is included because of the broad and inaccurate statements contained in the Petition for Writ of Certiorari. The testimony, the reports originally filed in the District Court and the other judicial proceedings therein are typical of the twenty-five consolidated cases. If this Petition for Writ of Certiorari is granted, we will more fully and completely give to this Court all facts and law necessary for a decision in this case.

7. Statement of Facts

Because of the necessity of considering the facts in the light of the decisions of this Court and the Courts of Appeal of the various Circuits, we will call the Court's attention to the facts which are pertinent upon this Cross-Petition for the Issuance of a Writ of Certiorari after discussing the applicable judicial decisions. See page 84e of this Cross-Petition.

8. Argument Amplifying the Reasons Relied Upon for Allowance of the Cross-Petition for Writ of Certiorari

(1) The school districts have followed their Constitutional duty as announced and as changed from year to year by the Supreme Court and the Court of Appeals of the Fifth Circuit. The districts are now characterized as "reluctant and recalcitrant" because total compulsory integration removing or substantially diminishing racial imbalance has not been already achieved "after 15 years"

"Line upon line, precept upon precept, here a little, there a little" has been the theme of the integration activists. They have said so often that the delay from 1954 to 1969 is solely caused by "reluctant and recalcitrant school

boards" that some of the courts have been persuaded to accept that allegation. Nothing could be further from the truth. This discussion will be limited to school districts within the Fifth Circuit for brevity and clarity.

The Court of Appeals of this Circuit first realized the enormous problems facing the administrators of schools in this Circuit, as well as in other Circuits. They carefully followed the admonition of the Supreme Court that the process of desegregation should be carried out "with all deliberate speed". The officials of the school districts conformed to these requirements, many beginning prior to the decisions mentioned below of February 9, 1961. One illustration is that discussed in this brief of the Meridian School District, which began its process leading to desegregation in the year 1954.

The present chaos and confusion which exists has arisen chiefly through the rendition of *Jefferson I* on December 29, 1966, its confirmation by the Court of Appeals en banc on March 29, 1967, writ of certiorari denied on October 9, 1967. This has been correctly characterized by the Court of Appeals of the Sixth Circuit in *Monroe* v. *Board of Commissioners of City of Jackson, Tennessee*, 380 F.2d 955, rendered July 21, 1967, as follows:

> We are asked to follow United States v. Jefferson County Board of Education, 372 F.2d 836 (CA 5, 1966), which seems to hold that the pre-Brown biracial states must obey a different rule than those which desegregated earlier or never did segregate. *This decision decrees a dramatic writ calling for mandatory* immediate integration. . . .
>
> However ugly and evil the biracial school systems appear in contemporary thinking, they were, as Jefferson, supra, concedes, de jure and were once found lawful in Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), and such was the law for 58 years

thereafter. *To apply a disparate rule because these early systems are now forbidden by Brown would be in the nature of imposing a judicial Bill of Attainder. Such proscriptions are forbidden to the legislatures of the states and the nation—U. S. Const., Art. I, Section 9, Clause 3 and Section 10, Clause 1.* Neither, in our view, would such decrees comport with our current views of equal treatment before the law. . . .

When the Court of Appeals of this Circuit in *Jefferson II* overruled eight cases decided by it over a long period of years, announced a dramatic and revolutionary writ contrary to the Constitutional principles announced by the other Circuits and those elucidated by this Court, the public school systems within this Circuit began a deterioration which can only be stopped by an examination by this Court of the decisions now destroying that system, followed by a clear statement of the rules which must be followed and the results obtained in order that the students in our public schools and their parents may receive equal treatment under the law and may be truly free.

It is hard to realize that only two school years have elapsed since *Jefferson II*, being the school years 1967-1968 and 1968-1969. In fact, the school districts here and hundreds of other school districts throughout the Fifth Circuit had accepted the meaning ascribed to "total desegregation" by the Court of Appeals of this Circuit, i.e., the extension of a true, reasonable and proper plan of freedom of choice to every grade in the school system. This had been varied, as time passed. Action required was to change from a plan of one-grade-a-year to a plan of two-grades-a-year, then a plan of four-grades-a-year, and then full extension of freedom of choice to all grades with the school year beginning in 1967. At no time prior to March 29, 1967 (made certain on October 9, 1967) had these school officials been told by their Court of Appeals that a plan which "promises realisti-

cally to work now" and an extension of "total desegregation" to their schools meant anything more than removal of the true vestiges of a dual school system and the formulation and implementation of a true freedom of choice plan.

The Secretary of Health, Education and Welfare has stated his opinion that if the timetable set up in the judgment of the Court of Appeals of the Fifth Circuit dated July 3, 1969, were to be enforced it would:

> . . . produce chaos, confusion and catastrophic educational setback to the 135,700 children, black and white alike, who must look to the 222 schools of these 33 school districts for their only available educational opportunity.

This belief is supported by the chaos and confusion now existing in the hundreds of school districts throughout the Fifth Circuit. That condition has resulted from repeated and unheralded changes made by the Court of Appeals of this Circuit in its "guidelines" and "directives", which disrupted the educational process. Indeed, Bedlam and the Tower of Babel[2] were each a "Sea of Tranquility" compared to the present state of our public schools.

Until *Jefferson I* was handed down on December 29, 1966, was confirmed by *Jefferson II* upon a rehearing en banc on March 29, 1967, with certiorari denied October 9, 1967, the school districts had been working under the commands of *Brown I, Brown II, Cooper* and their progeny. The very first sentence under the "STATEMENT" in the Petition for Writ of Certiorari is in direct conflict with the facts shown by this record. This is also true con-

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2. Bedlam was a "madhouse" erected in the edge of London in the early sixteenth century, from which the use of the present term has been derived. All are familiar with the Biblical account of what occurred during the erection of the Tower of Babel.

cerning the statement at the bottom of page 3 and top of page 4, and the statement on page 17 of the Petition for Writ. We will not attempt to detail or refute each statement, most of which are based upon generalized opinions of the writer. However, for the convenience of the Court, we quote these three particular statements:

> These cases test how much longer Negro schoolchildren in 14 substantially segregated school districts in Mississippi will have to wait to exercise their right to a desegregated education decreed by this Court more than 15 years ago in Brown v. Board of Education. . . .
>
> These freedom of choice plans did not work to disestablish the dual school system. Indeed, the token results achieved by these plans were even less than the results held insufficient in Green. . . .
>
> Delays in the past have served to embolden the recalcitrant, discourage voluntary compliance and nourish new schemes for evasion. Fifteen years of history teach us that every possibility for delay, however circumscribed, will be treated as an invitation for ready ingenuity to exploit.

These statements necessarily assume that "all deliberate speed" was not of judicial origin. As demonstrated below, the Court of Appeals held as late as 1965 and 1966 that extension of "freedom of choice" at the rate of four grades a year resulted in the school district being "fully desegregated". The record shows that freedom of choice has already been extended to every grade in every school district here.

We briefly trace the development of the rules laid down by the Court of Appeals of the Fifth Circuit under *Brown I, Brown II, Cooper, Goss, Watson, Green, Monroe, Raney, Carr* and other cases. It is of vital importance to remember that "hindsight is better than foresight". The

Petitioners are urging that there be imposed "a judicial Bill of Attainder" against school officials throughout the nation and particularly within this Circuit.

Looking back over the years, we see that the overruling of *Plessy* v. *Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), and the myriad of supporting cases has been broadened rather than narrowed. However, the Court will take judicial notice of the fact that when there is a revoluntionary departure from Constitutional construction which had been accepted for many generations, it is reasonable for all citizens to await the gradual development of decisional law in order to determine the exact and true meaning of the broad principles originally announced.

On *February 9, 1961,* after *Brown I, Brown II, Cooper* and succeeding cases clarified the new Constitutional principles, a group of cases was decided by the Court of Appeals of the Fifth Circuit. These cases were *St. Helena Parish School Board, et al.* v. *Hall,* 287 F.2d 376; *East Baton Rouge Parish School Board* v. *Davis,* 287 F.2d 380; *Louisiana State Board of Education, et al.* v. *Allen, et al.,* 287 F.2d 32; and *Louisiana State Board of Education, et al.* v. *Angel, et al.,* 287 F.2d 33. These cases enjoined the school boards from requiring racial segregation in public schools but did not set up any time limit or schedule of "desegregation".

Then on *July 24, 1962,* the Fifth Circuit handed down its decision in *Augustus* v. *Board of Public Instruction of Escambia County, Florida,* 306 F.2d 862. In that decision the Court found that the *Board must amend its plan to provide for one grade per year desegregation.*

Again in *August of 1962* the Court of Appeals of the Fifth Circuit in *Bush* v. *Orleans Parish School Board, et al.,*

308 F.2d 491, held that a policy of desegregation of one grade per year was proper and Constitutionally sufficient. The District Court had earlier withdrawn an order for desegregation of the first six grades by the fall of 1962. The Board presented a long-range plan providing for a grade a year desegregation and for redistricting of attendance areas in future years. This long-range plan was approved by the Court.

Almost one year later in June, 1963, in *Calhoun, et al.* v. *Latimer, et al.,* 321 F.2d 302, the Court of Appeals found that a desegregation plan earlier approved providing for one grade a year desegregation was operating in good faith and with substantial progress and that school officials were following the letter and the spirit of the plan. The Court found that plaintiff's objection to the feature of the plan which allowed the board to continue to assign pupils to the same school they formerly attended but with the right to transfer given those in the desegregated grades was unjustified. However, the Supreme Court reversed on May 25, 1964, 377 U.S. 263, 12 L.Ed.2d 288, 84 S.Ct. 1235, without fixing the timing of further desegregation.

On January 10, 1964, the Fifth Circuit decided *Board of Public Instruction of Duval County, Florida, et al.* v. *Braxton,* 326 F.2d 628. Here the Court *approved a grade a year desegregation plan* beginning with the first grade for the 1962-63 school year to be achieved by the use of a single geographical school district in the desegregated grades by permitting students in those grades to apply for admission to the school of their choice. *This plan was approved but the Court noted that it doubted that it would be necessary for twelve years to pass to accomplish desegregation and noted that desegregation plans could be speeded up.* The Court said that problems related to ad-

ministration arising from the physical condition of the school plants, school transportation system and personnel could be considered.

Three months later, on *March 20, 1964,* the Fifth Circuit decided the case of *Gaines* v. *Daugherty County Board of Education, et al.,* 329 F.2d 823. This case modified a plan submitted by the Board of Education by requiring the first two grades and the vocational schools to be desegregated in the first year. The Court postponed a decision on whether or not one grade per year desegregation was adequate pending a decision of the United States Supreme Court.

On *June 18, 1964,* the Fifth Circuit handed down its decision in *Armstrong* v. *Board of Education of the City of Birmingham,* 333 F.2d 47, where the Court required desegregation to proceed *at the rate of two grades per year* so as to accomplish complete desegregation within six years, i.e., by 1970.

Then on *July 31, 1964,* the Fifth Circuit again took up the case of *Gaines* v. *Daugherty County Board of Education*; the opinion following this consideration is reported in 334 F.2d 983. As a result of the *Calhoun* decision by the Supreme Court, the Fifth Circuit directed the District Court to enter an order in *Gaines* requiring immediate *total desegregation* of vocational schools by giving any pupil the choice of attending either the formerly Negro or formerly white vocational school. Freedom of choice for the fall of 1964 for all children in the first, second and twelfth grades and desegregation in the same manner of *two additional grades each year above the second grade and one additional grade below the twelfth so that total desegregation would be accomplished in four years.*

During the years 1964, 1965, 1966 and 1967, the school officials throughout the Fifth Circuit were looking to the

Court of Appeals for guidance and direction as to those actions which should be taken by them in order to be in obedience to Constitutional principles. Through hindsight, the Civil Rights activists are attempting to lay all blame upon these officials for not having not only accomplished desegregation as now required by the decisions of the courts, but also for not having brought about many years ago total integration or mixing of students. It is forgotten that the districts here, in common with many other school districts throughout the Fifth Circuit, were administering their schools in accordance with the principles announced by the Court of Appeals of this Circuit. This is illustrated by *Singleton v. Jackson Municipal Separate School District*, 348 F.2d 729, which was decided by the Court on June 22, 1965. This Circuit, speaking through Judge Wisdom, noted that on "*July 15, 1964*, the Board filed a grade-a-year segregation plan offering 'freedom of choice' type assignments to pupils entering the first grade in September, 1964". This was the first desegregation undertaken by the School Board. The significant portion of the opinion of the Court of Appeals which is applicable to many of the districts here is as follows:

> The United States Office of Education, Department of Health, Education and Welfare, has fixed minimum standards to be used in determining the qualifications for schools applying for federal financial aid. "The fall of 1967 is set as the target date for the extension of desegregation to all grades of school systems not fully desegregated in 1965-1966 as a qualification for Federal financial assistance"; a good faith start requires designation of at least four grades for the 1965-1966 school year. . . .
>
> If Selma, Alabama, can commence with desegregation of four grades for 1965-1966, Jackson, Mississippi, can at least catch up. And indeed in all but the most exceptional cases, all school districts commencing desegregation in fall 1965 should be expected to do as well.

Again, *on August 16, 1966,* there was before the Court of Appeals the question of action required under the Constitution by a school board. This was in the case of *Davis v. Board of School Commissioners of Mobile County,* 364 F.2d 896. Under this case, as well as *Singleton,* the school districts here were in compliance with the principles announced by the Court of Appeals of this Circuit and are not subject to being penalized because they could not foresee the complete reversal of principles and of policies which would take place on March 29, 1967, when *Jefferson II* was pronounced. In *Davis,* the pertinent provisions of the opinion which was issued through Chief Judge Tuttle are as follows:

> The plan was to have application in the school year 1963-64 to the twelfth grade in the City of Mobile only, in the school year 1964-65 it was to have application to the eleventh and twelfth grades in all schools in Mobile County and to the first and tenth grades in the City of Mobile schools. In 1965-66 it was to have application to grades one, two, nine, ten, eleven and twelve of all schools of Mobile County. In 1966-67, grades three and eight were to be added, in 1967-68, grades four and seven were to be added, in 1968-69 grade five was to be added, and in 1969-70 it became applicable to grade six. . . .
>
> In addition, two further modifications of the Mobile plan must be made. *The first is that the time must be shortened in such manner that all grades will be fully desegregated by the beginning of school in the fall of 1967,* the target date announced in the H.E.W. regulations. There is nothing on the record before us that demonstrates the need for any additional time under the formula announced in the Brown decision.

Criticism of past actions has not been confined to the period from 1964 to 1967. In fact, it still continues to be applied to actions taken by boards of education prior to

Brown I. The tendency to place burdens upon public officials for past actions which had been judicially declared to be lawful at that time, has unfortunately been followed by some of our courts and is now urged by the petitioners here. Judge J. P. Coleman of the Court of Appeals of the Fifth Circuit well said in his specially concurring opinion in *Jefferson II*:

> Prior to 1954, racially separate, if equal, schools had not been condemned as unconstitutional. *One is not to be punished or harassed for an act which was lawful when it was done.* Indeed, such condemnation in this instance would inferentially include some of the most highly respected Judges who ever graced the Supreme Court. They had opportunities to condemn the system but, in the exercise of perfect judicial integrity, did not. As I understand it, an Omnipotent God does not change yesterday when it is past and gone. Certainly this Court cannot do it. . . .
>
> *I further believe that whatever the Fourteenth Amendment requires of any State it requires of all States.* If we are requiring something here in the enforcement of Fourteenth Amendment rights that should not be required of all fifty States then we have exceeded our authority and we have misapplied the Constitution.

Judge Coleman's position is clearly and emphatically supported by the United States Court of Appeals of the Sixth Circuit in *Monroe* v. *Board of Commissioners, City of Jackson, Tennessee,* 380 F.2d 955, decided on July 21, 1967. That Court aligned itself with other Circuits in direct conflict with the Court of Appeals of the Fifth Circuit, as follows:

> The District Judge's opinion discusses pertinent authorities and concludes that *the Fourteenth Amendment did not command compulsory integration of all of the schools regardless of an honestly composed unitary neighborhood system and a freedom of choice plan.*

We agree with his conclusion. . . . He concluded *"We read Brown as prohibiting only enforced segregation."* 369 F.2d at 60. We are at once aware that we were there dealing with the Cincinnati schools which had been desegregated long before Brown, whereas *we consider here Tennessee schools desegregated only after and in obedience to Brown. We are not persuaded,* however, that we should devise a mathematical rule that will *impose a different and more stringent duty upon states which, prior to Brown, maintained a de jure biracial school system, than upon those in which the racial imbalance in its schools has come about from so-called de facto segregation*—this to be true even though the current problem be the same in each state. . . .

In Mapp v. Board of Education, 373 F.2d 75, 78 (CA 6, 1967), Judge Weick said,

> "To the extent that plaintiffs' contention is based on the assumption that the School Board is under a constitutional duty to balance the races in the school system in conformity with some mathematical formula, it is in conflict with our recent decision in Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966). . . ."

But to the extent that United States v. Jefferson County Board of Education, and the decisions reviewed therein, are factually analogous and express a rule of law contrary to our view herein and in Deal, we respectfully decline to follow them.

(2) A freedom of choice plan is the proper vehicle to set up and maintain schools conforming to all Constitutional guarantees and when such plan and the school system are administered fairly and without discrimination, all vestiges of a dual discriminatory racial school system are eradicated

A careful study of *Green, Monroe* and *Raney* reveals that these cases are not inconsistent with *Brown I, Brown*

II, Cooper, Goss and preceding decisions of this Court. School systems from three different states lying within three different Circuits were considered. The Court of Appeals of the Fifth Circuit has seized upon three of the many elements and held that the presence of any one of them will render a freedom of choice plan unconstitutional. This is a narrow view. A careful study (of *Green, Raney* and *Monroe*) reveals that the clauses and phrases which were utilized in reviewing these systems reflect the innumerable facets of school administration.

The elements elucidated in these cases included:

1. Every facet of school operations;
2. Faculty, staff and student body;
3. Transportation and construction of new buildings;
4. Extracurricular activities and facilities;
5. Majority to minority transfer;
6. Method of exercising the freedom of choice;
7. Assignment of students who did not exercise the freedom of choice;
8. Whether or not the "public school facilities for Negro pupils (were) inferior to those provided for white pupils";
9. Operation of the freedom of choice plan "in a constitutionally permissible fashion";
10. "All aspects of school life including faculties and staffs";
11. Whether "the board had indeed administered the plan in a discriminatory fashion";
12. The comparative treatment of students attempting "to transfer from their all-Negro zone schools to schools where white students were in the majority";

13. The comparative treatment of "white students seeking transfers from Negro schools to white schools";

14. Whether "the transfer (provision) lends itself to perpetuation of segregation".

Within the broad statements of *Green*, *Monroe* and *Raney* fall the following additional phases of school administration:

15. Athletic activities within the schools;

16. Parent-teacher associations;

17. Faculty and staff meetings within schools and of faculties and staffs of the various schools at the elementary, junior high school and high school levels;

18. School-sponsored visitation of student body officers and student committees;

19. In-service training of teachers and staff to assist in the desegregation process;

20. Participation by students in various types of student organizations.

It is clear that the following do not constitute vestiges of a de jure racially discriminatory dual school system:

(1) All-Negro schools and all-white schools, identifiable as being *attended* by students of only one race or by students predominantly of one race.

(2) Schools being *served* by faculty and staff composed of members of one race or composed predominantly of members of one race.

(3) Schools in which the number of students of the two races do not materially vary from year to year, i.e., in which statistics do not demonstrate that the number of Negro students is increasing in a school attended predom-

inantly by white students or in which Negro teachers are not increasing where the faculty is composed predominantly of members of the white race.

(4) Statistical information may be considered in connection with evidence concerning all other phases of the administration of schools. However, statistics cannot be the sole or major basis of a judicial determination as to whether or not the vestiges of a dual school system have been eliminated.

This Court in *Green, Raney* and *Monroe,* clearly enunciated the basic principles that the Constitution requires all districts to be operated on a unitary, nonracial, nondiscriminatory basis and that, in districts having a history of *de jure* segregation, the school boards operating such school systems were required to effectuate a transition to a racially nondiscriminatory school system. In this context, this Court stated that steps must be taken in which racial discrimination would be eliminated, root and branch. These decisions, it is submitted, clearly establish that each school district of the nation must be operated as a unitary, nonracial, nondiscriminatory school district and that, in districts that have a history of *de jure* segregation, the trustees of the school district have the affirmative duty of "eradicating the last vestiges of the dual system". The confusion and misunderstanding now rampant in this Circuit grows out of the interpretation and application of these basic concepts. It is essential that this confusion be eliminated. Literally hundreds of thousands of children are involved, as well as the entire educational system. The interpretation and application of these basic concepts, it is submitted, is probably the most important question facing the courts of this nation today. Involved in the answer to this question is whether the schools will be operated, in their day to day operations, by a federal department under the supervision and guidance of the federal judiciary, or

whether the officials of the districts can, through qualified educators, operate the schools in conformity with the concepts of the applicable provisions of the Constitution as defined by the courts.

The two concepts are as follows: (A) a unitary, nonracial, nondiscriminatory school system, and (B) the vestiges of a dual system which must be removed by the trustees of the school districts. We will briefly discuss these two concepts with the thought in mind of at least demonstrating the necessity for a clearcut, understandable judicial definition—a definition that is based upon constitutional principles and not upon the changing guidelines of a department of the executive branch of our government dealing with the expenditure of funds.

What is a unitary, nonracial, nondiscriminatory school system?

It is submitted that the answer to this question is not too difficult. It is a school system which is open and free to all pupils and in which race is not a factor. In fact, if it is to be "nonracial", then it is a contradiction on its face to take action that is motivated by the race of the pupil. One panel of the Fifth Circuit has given a definition in *Broussard*, as follows:

> ". . . it would appear that an 'integrated, unitary school system' is provided where every school is open to every child. It affords 'educational opportunities on equal terms to all.' That is the obligation of the Board."

This Court in *Jefferson II* stated as follows:

> "The governmental objective of this conversion is—educational opportunities on equal terms to all."

It is submitted that this concept is clear, can be followed and implemented by school trustees of all school dis-

tricts. The school districts throughout the nation, whether they have a history of *de jure, de facto,* or no segregation at all, must be operated on a unitary, nonracial basis. This is easily understood and can be easily implemented by the trustees that are acting in good faith. If the trustees are not acting in good faith, such can be easily demonstrated to and corrected by the district court and will not require that the federal courts become involved in the day to day operations of the schools in the school districts.

It is submitted that, if this Court expressly adopts the definition of a unitary, nonracial, nondiscriminatory school system as succinctly set out in *Broussard,* which, with deference, it ought to do, then the only problem which would remain would be to properly deal with the second concept.

What are the vestiges of the dual system which must be eradicated by the trustees of the school districts?

Quite frankly, it would also appear that the answer to this question should not be too difficult. It is submitted, however, that some of the recent decisions of various panels of this Circuit have made requirements of school districts that are *not* in keeping with the obligation to remove the vestiges of the dual system and have thereby created confusion and consternation concerning the meaning of this obligation.

Our discussion here will be based upon the assumption that we are correct in that the obligation of the trustees of the school districts located in formerly *de jure* segregated states is the affirmative duty to eradicate the last vestiges of the dual system. If this be true, then these vestiges must be identified and eradicated. It is not enough to operate a unitary system at this time. These trustees must go further and eradicate or eliminate any vestiges of the dual system.

Illustrative of the points we are attempting to make here is the decision by a panel of this Circuit in *Adams*. The panel in *Adams*, with no record before it, and with no opportunity being offered counsel to be heard, made a specific finding that an all-Negro school was a vestige of the dual system and must be eradicated in all districts in the Fifth Circuit. Since that time, the language in *Adams* has been quoted by several panels of this Circuit. Insofar as we know, however, no case has ever been presented to this Court which contained facts which would support a finding that this is a vestige of a dual system. A study of the history of litigation in this field indicates that the "racial statistics" approach as a measuring device for determining whether the last vestiges of the dual system have been removed originated with the office of Health, Education and Welfare. That office promulgated guidelines which contained statistical requirements to be used in determining whether funds would be made available to the various school districts. It is submitted that this approach has been adopted by some of the panels in this Circuit as a constitutional requirement, when, as a matter of fact, the office of Health, Education and Welfare has no authority to make constitutional interpretations that are binding on the courts and that office had no hearing or proof upon which to reach such a conclusion in the first place. Certainly the decisions of this Court should be supported by proof.

The situation is, therefore, that we have Courts of Appeal for different circuits reaching opposite conclusions based on judicial notice and without the benefit of any actual proof in the record on which these conclusions could be based.

In these proceedings now before this Court, there is proof, which was uncontradicted, that the existence of all-

Negro schools is *not* a vestige of the dual system. In addition, there is before this Court statistical information taken from the official records of the office of Health, Education and Welfare showing the racial composition of schools in the one hundred largest school districts in this nation. Most of these districts have never had a dual system. These statistics show, and we submit this is conclusive, that all-white and all-Negro schools exist in every school district where there is a large percentage of both white and Negro pupils. These statistics show, beyond question, that all-white and all-Negro schools do exist in school districts that have never had a dual system. As a matter of fact, of the 12,497 schools in these one hundred school districts, assuming that a school with less than one percent of the minority race is an all-Negro or all-white school, 6,137 are either all-white or all-Negro. In other words, over forty-eight percent of the schools in the one hundred largest school districts in this nation are either all-white or all-Negro. Most of these districts are in areas that have never had a dual system. We submit, therefore, that for this Court to adjudicate that the existence of an all-Negro or an all-white school is, in and of itself, a vestige of the dual system is without support of any proof, is incorrect, and is clearly erroneous.

The language of the Court in *Jefferson*, sitting in banc, was that there was to be "no Negro schools and no white schools—just schools". This language of this Court in its in banc decision is in accord with the obligation of the school trustees to operate a unitary school system. The schools are not to be Negro schools nor are they to be white schools. They are to be just schools. This does not, however, mean that there must be both white and Negro pupils in attendance at each and every school. Since the existence of schools at which only Negroes attend, or the existence of schools at which only whites attend is *not*,

in and of itself, a vestige of the dual system, then there is no constitutional basis on which the courts may or can require their elimination or eradication as being a vestige of the dual system.

In addition to the foregoing, there is in this record testimony of experts which demonstrates conclusively that (1) all-Negro or all-white schools are not vestiges of the dual system and (2) a definite or specific amount of integration of the races in the schools is not an indication or even proof that the schools are operated on a unitary basis with the vestiges of the dual system eliminated or eradicated—at best, it is only peripherally relevant to the issues.

This evidence also stands uncontradicted and will be discussed and presented in full, if this petition is granted and this Court hears these cases.

What we have stated concerning pupils is equally applicable to faculties. The proof is that an all-Negro faculty or an all-white faculty is not, in and by itself, a vestige of the dual system and does not destroy the unitary nature of the school system.

Other illustrations could be given. It is submitted, however, that the foregoing discussion points up the absolute necessity of this Court determining the issues presented by these cases.

Much confusion has arisen from the various interpretations of the duty of school boards articulated in *Green*:

> School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly *charged with the affirmative duty* to take whatever steps might be necessary to *convert to a unitary system in which racial discrimination would be eliminated root and branch.* See Cooper v. Aaron, supra, at 7, 3 L.Ed.2d at 10; Bradley v. School Board, 382 U.S. 103, 15 L.Ed.2d 187, 86 S.Ct. 224; cf. Watson v. City of

Memphis, 373 U.S. 526, 10 L.Ed.2d 529, 83 S.Ct. 1314. The constitutional rights of Negro school children articulated in Brown I permit no less than this; *and it was to this end that Brown II commanded school boards to bend their efforts. . . .* Note. "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible *eliminate the discriminatory effects of the past as well as bar like discrimination in the future.*" Louisiana v. United States, 380 U.S. 145, 154, 13 L.Ed.2d 709, 715, 85 S.Ct. 817.

Heretofore we have quoted the words used by the Supreme Court of the United States to describe constitutionally acceptable school systems and to delineate constitutional duties of school officials. Although the passage of time now requires more realistic results and more comprehensive steps without further delay, the basic constitutional principles originally announced in *Brown I* have not been changed in the succeeding pronouncements by the Supreme Court up to and including *Carr*.

The Court of Appeals of the Sixth Circuit in *Goss* construed the meaning of *Green* and succeeding cases. In doing so it said:

> In *Green* the Court said school boards must adopt plans which "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." 391 U.S. at 442, 88 S.Ct. at 1696. The Court further said that it would be their duty "to convert to *a unitary system in which racial discrimination would be eliminated root and branch.*" 391 U.S. at 437-438, 88 S.Ct. at 1694. We are not sure that we clearly understand the precise intendment of the phrase "a unitary system in which racial discrimination would be eliminated," *but express our belief that Knoxville has a unitary system designed to eliminate racial discrimination.*

The unitary, nondiscriminatory, nonracial school system in Knoxville was found by the Court to contain five all-Negro schools and 29 schools in which the teaching staffs were composed exclusively either by members of the Negro race or members of the white race.

In *Goss* the Court chose between the constitutional principles enunciated in *Green*, *Raney* and *Monroe* as against those announced by this Circuit by the panels of the Court in *Adams*, *Duval*, *Graves* and *Greenwood*, which had varied and extended *Jefferson II*. It denied the contentions of the plaintiffs (identical with those which have now been embraced by panels of this Circuit) as follows:

> Presented to us upon plaintiffs' appeal are the following statements of questions involved:
>
> I. Whether the Knoxville School System is completely desegregated in spite of the fact that the Negro schools under dual operation remain identifiable as Negro schools and are attended almost exclusively by Negro students?
>
> II. Whether the Knoxville School System should have been ordered to pair identifiable Negro schools which could be paired, locate new construction to help eliminate identifiable Negro schools, and take other affirmative action to disestablish segregation?
>
> Preliminarily answering question I, it will be sufficient to say that the fact that there are in Knoxville some *schools which are attended exclusively or predominantly by Negroes does not by itself establish that the defendant Board of Education is violating the constitutional rights of the school children of Knoxville.* Deal v. Cincinnati Bd. of Education, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847, 88 S.Ct. 39, 19 L.Ed.2d 114 (1967); Mapp v. Bd. of Education, 373 F.2d 75, 78 (6th Cir. 1966), cert. denied, 389 U.S. 847, 88

S.Ct. 39, 19 L.Ed.2d 114 (1967). *Neither does the fact that the faculties of some of the schools are exclusively Negro prove, by itself, violation of Brown.*

Four months later the Court of Appeals of the Sixth Circuit had before it *Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee*, 380 F.2d 955, which was decided July 21, 1967. This involved formerly racially segregated de jure school systems. Because of its significance here, its consideration of *Jefferson I* and *Jefferson II* and its express repudiation of the construction thereof later adopted by panels of this Court, we quote at length from such decision:

> Appellants argue that the courts must now, by reconsidering the implications of the Brown v. Board of Education decisions in 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), and upon their own evaluation of the commands of the Fourteenth Amendment, require school authorities to take affirmative steps to eradicate that racial imbalance in their schools which is the product of the residential pattern of the Negro and white neighborhoods. The District Judge's opinion discusses pertinent authorities and concludes that *the Fourteenth Amendment did not command compulsory integration of all of the schools regardless of an honestly composed unitary neighborhood system and a freedom of choice plan. We agree with his conclusion.* We have so recently expressed our like view in Deal et al. v. Cincinnati Board of Education, 369 F.2d 55 (CA 6; 1966), petition for cert. filed, 35 LW 3394 (U.S. May 5, 1967) (No. 1358), that we will not here repeat Chief Judge Weick's careful exposition of the relevant law of this and other circuits. He concluded "*We read Brown as prohibiting only enforced segregation.*" 369 F.2d at 60. We are at once aware that we were there dealing with the Cincinnati schools which had been desegregated long before Brown, whereas *we consider here Tennessee schools desegregated only after and in*

obedience to Brown. We are not persuaded, however, that we should devise a mathematical rule that will *impose a different and more stringent duty upon states which, prior to Brown, maintained a de jure biracial school system, than upon those in which the racial imbalance in its schools has come about from so-called de facto segregation*—this to be true even though the current problem be the same in each state.

We are asked to follow United States v. Jefferson County Board of Education, 372 F.2d 836 (CA 5, 1966), which seems to hold that the pre-Brown biracial states must obey a different rule than those which desegregated earlier or never did segregate. . . . In Mapp v. Board of Education, 373 F.2d 75, 78 (CA 6, 1967), Judge Weick said,

> "To the extent that plaintiffs' contention is based on the assumption that the School Board is under a constitutional duty to balance the races in the school system in conformity with some mathematical formula, it is in conflict with our recent decision in Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966)."

However ugly and evil the biracial school systems appear in contemporary thinking, they were, as *Jefferson*, supra, concedes, de jure and were once found lawful in Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), and such was the law for 58 years thereafter. *To apply a disparate rule because these early systems are now forbidden by Brown would be in the nature of imposing a judicial Bill of Attainder.* Such proscriptions are forbidden to the legislatures of the states and the nation—U.S. Const. Art. I, Section 9, Clause 3 and Section 10, Clause 1. *Neither, in our view, would such decrees comport with our current views of equal treatment before the law. . . . But to the extent that United States v. Jefferson County Board of Education, and the decisions reviewed therein,* are factually analogous and express a rule of law contrary to our view herein and in *Deal, we respectfully decline to follow them.*

A writ of certiorari was granted by the Supreme Court in this case and the decision appears as *Monroe*. The sole issue in that case was the constitutionality of a "free transfer" provision in the plan of desegregation. When the same suit again came before the Court of Appeals of the Sixth Circuit on February 10, 1969, as *Goss* the Court construed the holding of the Supreme Court in *Monroe* and upheld the above rule set forth in Judge Coleman's specially concurring opinion:

> In Monroe v. Bd. of Commissioners, 380 F.2d 955, 159 (6th Cir. 1967), we expressed our view that the end product of obedience to Brown I and II *need not be different in the southern states, where there had been de jure segregation, from that in northern states in which de facto discrimination was a fortuity. Our observations in that regard were not found invalid by the Supreme Court's opinion reversing our Monroe decision.* See Monroe v. Board of Commissioners, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968).

When *Cooper* again reached the Court of Appeals of the Eighth Circuit the opinion was rendered as *Clark v. Board of Education of Little Rock School District*, 369 F.2d 661, decided December 15, 1966, rehearing denied, 374 F.2d 569. The Court delineated a school system and its operation which falls within the constitutional mandate of the Supreme Court as follows:

> The Constitution prohibits segregation of the races, the operation of a school system with dual attendance zones based upon race, and assignment of students on the basis of race to particular schools. If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to their classrooms. We find no unlawful discrimination in the giving of students a free choice of schools.

The school system of Little Rock had been a dual segregated school system. Hence, the decision of the Eighth Circuit in *Clark* and that of the Sixth Circuit in *Goss* (both considering formerly de jure segregated systems) are in direct conflict with *Hinds County*.

A classic definition of a constitutionally permissible freedom of choice plan is that used by Judge Godbold in clarifying the terms contained in his dissenting opinion to *Jefferson II* as follows:

> Throughout this opinion "freedom of choice" and "free choice" refer to a plan validly set up, properly administered, and with choices freely exercised without external pressures, so that the plan itself (as opposed to the statistical results produced by exercised choices) is in all respects constitutionally acceptable.

There is no difference between the ultimate constitutional goal of school authorities in northern and southern states, those administering de facto systems as compared to those administering formlery de jure systems. The difference lies in the necessity of affirmative action to remove *the vestiges of the dual school system*.

The rule applied in *Clark* to the Little Rock school system is certainly applicable to the fourteen districts here:

> Though the Board has a positive dufy to initiate a plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. . . . The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. It is true that statistics on actual integration may tend to prove that an otherwise constitutional system is not being constitutionally operated. However, these statistics certainly do not conclusively prove the unconstitutionality of the system itself. . . .

> In short, the Constitution does not require a school system to force a mixing of the races in school according to some predetermined mathematical formula. Therefore, the mere presence of statistics indicating absence of total integration does not render an otherwise proper plan unconstitutional.

The initial step to determine what are vestiges of a racially discriminatory dual school system (in which separation of the races has been de jure) as distinguished from racially nondiscriminatory unitary school systems (in which separation of the races has been de facto) is to eliminate those elements common to both.

In *Hinds County* educational experts of unimpeached ability, training and experience testified, without contradiction, that all-Negro and all-white schools occur throughout the United States wherever there are sufficient numbers of Negro students to bring this result through neighborhood patterns or natural desires of students and their parents. This evidence also demonstrated that any specific amount of integration or change of percentages of integration of the races in schools does not constitute a material element in determining whether a school system is operated on a racially discriminatory basis or is operated as a nonracial, nondiscriminatory unitary system, such matters being only peripherally relevant to such issue.

Compilations before this Circuit were assembled from the statistical information filed with the Department of Health, Education and Welfare and show the racial composition of schools in the one hundred largest school districts in this nation as of October 15, 1968. They were filed by school districts under the requirements of Title VI of the Civil Rights Act of 1964 and are upon Civil Rights Forms OS CR 102-1 and OS CR 101. Most of these districts have never had a dual system.

Assuming that a school with less than one percent of the minority race is an all-white or all-Negro school, of the 12,497 schools in the one hundred largest school districts in the United States 6,137 schools are ether all-white or all-Negro. Thus, more than forty-eight percent of the schools in these districts are either all-white or all-Negro. It is also found that in districts having as much as twenty percent or more Negro student enrollment, only one district does not have within it all-Negro schools. This is the Rochester, New York, Monroe County School District. In the consolidated cases at bar only one of the thirty districts has less than twenty percent Negro student enrollment. These facts cannot be a "vestige of the dual system of schools" but resulted from the natural process of education in a unitary, non-racial school system:

District	Total Schools in Dist.	Desegregated Schools	Schools of One Race	All-Negro Schools
Chicago Public Schools, Chicago, Ill.	610	218	392	208
Indianapolis Public Schs., Indiana	119	67	52	17
Des Moines Community Schs., Iowa	81	45	36	—
Boston School Dept., Massachusetts	196	140	56	11
Detroit Public Schools, Michigan	302	204	98	67
Special School Dist. No. 1, Minneapolis, Minn.	98	56	42	—
St. Louis City Sch. Dist., Mo.	164	50	114	83
Kansas City School Dist., Mo.	99	56	43	19
Newark Public Schools Newark, N. J.	80	53	27	27
Oklahoma City Public Sch. Dist., I-89, Okla.	115	44	71	15
Dallas Indep. Sch. Dist., Texas	173	56	117	26
Los Angeles School Dist., Calif.	591	232	359	65
Sch. Dist. No. 1, City & Co. of Denver, Colo.	116	62	54	3
District of Columbia Public Schools	188	74	114	114
Gary Community Schools, Gary, Ind.	45	20	25	21
Cleveland, Ohio, Cuyahoga Co.	180	65	115	57
New York City Public Schs. N.Y., N.Y.	853	695	158	113
Houston Indep. Schools, Houston, Texas	225	86	139	61
School Dist. of Philadelphia, Pa.	278	191	87	63

Broussard approved the Houston Independent School District as being in compliance with constitutional requirements under a freedom of choice plan. According to its official report as of October 15, 1968, there then remained sixty-one all-Negro schools, seventy-eight all-white schools, and there were eighty-six desegregated schools.

(3) The construction by the Court of Appeals of the Fifth Circuit of the application of Section 1 of the Fourteenth Amendment to public schools, announced in Hinds County and other cases, conflicts with decisions of this Court

There is a fundamental conflict between the constitutional principles announced by the Supreme Court in *Brown I, Brown II, Green, Raney* and *Monroe* and those announced by this Court first in *Jefferson I* and *Jefferson II* and thereafter radically broadened by *Adams* and succeeding panel decisions.

In *Brown I* the Supreme Court found that "segregation in public education . . . is a denial of equal protection of the laws" and violates the Fourteenth Amendment.

In *Brown II* a constitutionally acceptable school system is described as: "*A racially nondiscriminatory school system*".

In *Cooper* the Court stated the action required to fashion a constitutionally acceptable school system as: "*The elimination of racial discrimination* in the public school system".

In *Goss*[3] the rule was stated: "*That state-imposed separation* in public schools is inherently unequal and *results in discrimination*".

3. *Goss* v. *Bd. of Ed. of Knoxville, Tennessee*, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963).

After *Brown I*, and during the period included in the rendition of *Brown II*, *Cooper*, *Goss* and parallel cases, the Fifth Circuit rendered nine decisions construing the constitutional principles announced by the Supreme Court.[4]

A succinct statement of these constitutional principles appears in *Stell*:

> No court has required a "compulsory racially integrated school system" to meet the constitutional mandate that there be no discrimination on the basis of race in the operation of public schools. See Evers v. Jackson Municipal Separate School District, 5 Cir., 1964, 328 F.2d 408, and cases there cited. The interdiction is against enforced racial segregation. Incidental integration, of course, occurs through the process of desegregation. Cf. Stone v. Board of Education of Atlanta, 5 Cir., 1962, 309 F.2d 638.

The panels of this Circuit rendering the nine decisions bottomed upon the *Avery* and *Stell* construction of *Brown I*, *Brown II* and *Cooper* included nine of the members of the Court of Appeals of the Fifth Circuit. For thirteen years the school officials in the hundreds of school districts in the Fifth Circuit relied upon such construction and fashioned their school systems upon its framework. Then, *Jefferson II* (rendered March 29, 1967, with certiorari denied October 9, 1967) swept this aside. Such decision substituted a radically different constitutional concept.

We have already quoted from *Jefferson I*. *Jefferson II* began this radical departure by using one additional word in describing a constitutionally planned and operated school system:

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4. *Avery* v. *Wichita Falls Independent School District*, 1956, 241 F.2d 230; *Borders* v. *Rippy*, 1957, 247 F.2d 268; *Rippy* v. *Borders*, 1957, 250 F.2d 690; *Cohen* v. *Public Housing Administration*, 1958, 257 F.2d 73; *City of Montgomery, Ala.* v. *Gilmore*, 1960, 277 F.2d 364; *Boson* v. *Rippy*, 1960, 285 F.2d 43; *Stell* v. *Savannah-Chatham County Board of Education*, 1964, 333 F.2d 55; *Evers* v. *Jackson Municipal Separate School District*, 1964, 328 F.2d 408; *Lockett* v. *Bd. of Ed. of Muscogee Co.*, 1965, 342 F.2d 225.

> The Court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about *an integrated*, unitary school system in which there are no Negro schools and no white schools—just schools. . . The necessity of overcoming the effects of the dual school system in this circuit *requires integration* of faculties, facilities, and activities, as well as students. *To the extent that earlier decisions* of this Court (more in the language of the opinions, than in the effect of the holdings) *conflict with this view, the decisions are overruled.*

Later decisions of numerous panels of this Circuit have stretched the meaning and application of such terms far beyond the result originally appearing to be intended.

It does not seem to have been generally recognized that the Supreme Court of the United States in *Green*, *Raney*, *Monroe* and *Carr* not only failed to place its stamp of approval upon *Jefferson II*, but *affirmatively declined to hold that the Fourteenth Amendment requires compulsory integration in public schools.* These cases clearly and unmistakably describe the school system which meets all constitutional guarantees.

In *Green* such system is described as: "*A racially nondiscriminatory school system*"—"a unitary, nonracial system of public education"—"a unitary system in which racial discrimination would be eliminated root and branch."

In *Raney* such system is described as: "*A unitary, nonracial school system*".

In *Monroe* such school system is described as: "A racially nondiscriminatory system"—"*a unitary system in which racial discrimination would be eliminated root and branch*"—"a system without a 'white' school and a 'Negro' school, just schools".

In *Carr* such school system is described as "*A system of public education free of racial discrimination*"—completely unified unitary nondiscriminatory school system"—"a racially nondiscriminatory school system".

This Court affirmatively declined to hold in *Green* that the Fourteenth Amendment requires "compulsory integration", saying:

> The Board attempts to cast the issue in its broadest form by arguing that its "freedom of choice" plan may be faulted only *by reading the Fourteenth Amendment as universally requiring "compulsory integration"*, a reading it insists the wording of the Amendment will not support. *But that argument ignores the thrust of Brown II.* In the light of the command of that case, *what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" Brown II held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system.*

Contrary to the decision of many of the panels which have cited above *Jefferson II* does not support their holdings for, as Judge Coleman then said:

> Nor do I understand it to direct that there shall be a specified *percentage* of the various races in any particular public school or that there shall be proportional representation of the races brought about by arbitrary order. I agree with Judges Gewin and Bell that the opinion strongly portends such a possibility. *But paragraph 5 of the en banc opinion certainly disclaims any such intention.*

Indeed the panel decisions are a far cry from the description of the role of statistics contained in *Jefferson II* as they do not conform to the constitutional objective announced in the majority opinion:

> *The governmental objective in this conversion is—educational opportunities on equal terms to all.* The

> criterion for determining the *validity* of a provision in a school desegregation plan is *whether the provision is reasonably related to accomplishing this objective.*

The *Adams* dicta and its progeny have arisen through the consideration of one paragraph, one sentence or even a portion of one sentence in *Green, Raney,* or *Monroe.* A study of these opinions as a whole (supplemented by *Carr*) reveal the fallacy of the reasoning upon which the *Adams* dicta was based. The panels of this Court have failed to follow the teachings of these cases. It is only by a consideration of the many complex factors entering into the educational process and particularly into the desegregation of a formerly de jure and formerly de facto segregated school, that we are able to chart the course which is in the best interest of the students *and* of our public schools. This was the objective stated by Mr. Justice Black in *Carr.*

In *Green* the Supreme Court found that the school system of New Kent County was a dual school system and described such system as follows:

> "*Racial identification of the system's schools was complete,* extending not just to the composition of student bodies at the two schools but *to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.*

In *Green, Raney* and *Monroe* there was considered many of the factors which, *when taken as a whole and in combination,* should be utilized in determining the application of the following test:

> Where the Court finds the board to be acting in good faith and the proposed plan to have real prospects of dismantling the state-imposed dual system "at the *earliest practicable date*" then the plan may be said to provide effective relief. Moreover, whatever plan is adopted will require evaluation in practice. . . .

Yet under the *Adams* dicta, any one of the following factors standing alone will outlaw freedom of choice and require compulsory integration by mandatory student assignment:

If there is an all-Negro school in the district freedom of choice is "impermissible"; or

If "only a small fraction of Negroes [have] enrolled in white schools" freedom of choice is impermissible; or

If "no substantial integration of faculties and school activities" has been attained, freedom of choice is impermissible.

In *Choctaw* a panel bottomed its decision upon a court's finding that there was an all-Negro school in the district and then relied upon statistics holding that it is insufficient to require 10% integration one school year, followed by 20% integration the next year and that even if such percentages were attained, complete student desegregation must be compelled *now* and freedom of choice is rendered constitutionally impermissible.

At one stroke this Circuit set up a test which, under the Court's own announcements, automatically outlaws every freedom of choice system within the Circuit. In *Jefferson I* it was held:

> In this circuit, white students rarely choose to attend schools identified as Negro schools.' (372 F.2d 836, 889).

On April 18, 1968, it was held in *United States v. Board of Ed., Polk County*, 395 F.2d 66, 69:

> The record here discloses, *what the courts have previously commented on*, that is it is rare, almost to the point of nonexistent, that a white child, under a freedom of choice plan, elects to attend a "predomi-

nantly Negro" school. As this court said in the first *Jefferson* case:

> "In this circuit white students rarely choose to attend schools identified as Negro schools. . . ."

Yet on August 20, 1968, only four months later, the *Adams* dicta outlawed any freedom of choice plan "if in a school district there are still all-Negro schools".

Again on September 24, 1968, in *Graves* the panel said:

> In its opinion of August 20, 1968, this Court noted that, under *Green* (and other cases), *a plan that provides for an all-Negro school is unconstitutional.*

Judge Bell sounded a warning in *Jefferson IV* which is accentuated by the decision in these twenty-five consolidated cases. The deviation from accepted constitutional principles and the destructive effect upon the desegregation process is increasing with every decision by a panel of this Court. On July 1 of this year, Judge Bell said in *Jefferson IV*:

> I concur in the opinion and the result thereof *except to the extent, if any, that the decisions of this court cited therein may exceed the requirements laid down by the Supreme Court* in *Green* v. *County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968); *Raney* v. *Board of Education of Gould, Arkansas*, 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee*, 391 U.S. 450 (1968), to-wit: that the dual school systems be disestablished. I am in fundamental disagreement with the approach of an appellate court stipulating the details of transition plans where couched in terms of constantly escalating interim demands. *The specter of escalation, with no end in sight, retards the disestablishment process.*

Congress has never acted as it could have under Section 5 of the Fourteenth Amendment to set uniform standards for disestablishing dual school systems. Meanwhile, no court has defined "disestablishment". My view continues to be that school systems are entitled to know the ultimate standard. *United States v. Jefferson County Board of Education*, 5 Cir., 1967, 380 F.2d 385, dissenting opinion at p. 413.

(4) The Court of Appeals of the Fifth Circuit is in direct conflict with the other Circuits. Jefferson I and Jefferson II (as gradually expanded and varied by sixteen panels) now require compulsory integration in the student bodies and faculties of all schools, leading to the ultimate end of racial balance.

Suddenly the "rug was pulled from under" thousands of devoted educators in the Fifth Circuit by *Jefferson I* and *Jefferson II*. Ever since that time these officials have been kept off balance and unable to mount and pursue a definite and effective program by the perennial changes and expansions of these decisions.

Although the opinion in *Jefferson I* covers sixty-five printed pages and contained many qualifying statements which have kept lawyers and educators confused to this date, the panel decisions have now developed mention that the ultimate effect of this decision is contained in one statement (372 F.2d 845):

> The United States Constitution, as construed in *Brown*, requires public school systems to integrate students, faculties, facilities and activities. As we see it, the law imposes an absolute duty to desegregate, that is, disestablish segregation. And an absolute duty to integrate, in the sense that a disproportionate concentration of Negroes in certain schools cannot be ignored; racial mixing of students is a high priority educational goal.

The great danger in slogans and catch words is that they may be accepted in the belief that they mean one thing and, too late, it will be realized that they meant another. This is true of the decisions in *Jefferson I* and *II*, with their many qualifying and explanatory phrases. In fact, Judge J. P. Coleman specially concurred in *Jefferson II* saying:

> I do not understand that this Court has abandoned freedom of choice, if that choice is real instead of illusory. Nor do I understand it to direct that there be a specified percentage of the various races in any particular public school or that there be proportional representation of the races brought about by arbitrary order . . .

Nevertheless, Judges Gewin and Bell stated at page [illegible] of 380 F.2d the following:

> The majority rule requiring compulsory integration is new and novel, and it has not been accepted by the Supreme Court or by the other circuits.

Seven of the actions included in these consolidated cases were before the panel which decided *Adams* v. *Mathews*, 403 F.2d 181, August 20, 1968, upon appeals from docket settings. Since that date different panels of this Circuit have decided fifteen additional school desegregation cases.[3]

[3] *Adams* v. *Mathews*, No. 26432, August 20, 1968, Judges Wisdom, Goldberg and Morgan, 403 F.2d 181; *Deal* v. *Jefferson*, No. 25439, August 29, 1968, Judges Wisdom, Coleman and Rubin, 403 F.2d 908; *Graves* v. *Walton City*, No. 26432, September 27, 1968, Judges Wisdom, Goldberg and Morgan, 404 F.2d 189; *U. S. A.* v. *Greenwood*, No. 25514, February 4, 1969, Judges Brown, Thornberry and Taylor, 406 F.2d 1086; *Henry* v. *Clarksdale*, No. 24235, March 6, 1969, Judges Wisdom, Thornberry and Coe, 409 F.2d 682; *U. S. A.* v. *Indianola*, No. 25655, April 21, 1969, Judges Dyer, Simpson and Cabot, 410 F.2d 626; *Anthony* v. *Marshall City*, No. 26412, April 15, 1969, Judges Ainsworth, Thomson and Mitchell, 409 F.2d 1287; *Hall* v. *St. Helena*, No. 26430, May 28, 1969, Judges Brown, Gewin and Cabot, F.2d [illegible]; *Davis* v. *Mobile City*, Nos. 26880, 27401, 27280,

These panel opinions conflict with each other and with prior decisions of panels of this Circuit.[6] They construe, restrict, extend, vary and violate not only the principles laid down by this Circuit en banc in *Jefferson II* (limiting *Jefferson I*) but also those laid down by the United States Supreme Court in *Green*, *Monroe* and *Raney*.[7] They conflict with decisions of other Circuits.[8] As a result, the district courts and the school boards in this Circuit are in utter confusion.

The only members of this Circuit serving upon more than two of these panels were Judge Wisdom, who was the presiding judge of nine panels; Judge Brown, who was the presiding judge of four panels, and Judge Thornberry,

June 3, 1969, Judges Brown, Dyer and Hunter, F.2d ; *U. S. A.* v. *Jefferson III*, No. 27444, June 26, 1969, Judges Bell, Goldberg and Atkins, F.2d ; *Hampton* v. *Choctaw Cty.*, No. 27297, June 26, 1969, Judges Wisdom, Carswell and Roberts, F.2d ; *Choctaw Cty.* v. *U. S. A.*, No. 25639, June 26, 1969, Judges Wisdom, Carswell and Roberts, F.2d ; *U. S. A.* v. *Jefferson IV*, No. 26584, July 1, 1969, Judges Wisdom, Bell and Godbold, F.2d ; *U. S. A.* v. *Hinds Cty.*, Nos. 28030, 28042, July 3, 1969, Judges Brown, Thornberry and Morgan, F.2d ; *U. S. A.* v. *Crisp*, No. 27446, July 3, 1969, Judges Wisdom, Morgan and Davis, F.2d ; *U. S. A.* v. *Baldwin Cty.*, No. 27281, July 9, 1969, Judges Wisdom, Carswell and Roberts, F.2d

6. *Broussard* v. *Houston Independent School District*, May 30, 1968, 403 F.2d 34, Petition for Rehearing en banc (in the light of *Green*; *Monroe* and *Raney*) denied October 2, 1968; *Kerce* v. *Richmond County*, July 30, 1968, 399 F.2d 11; *Hopkins* v. *Fairfield*, July 30, 1968, 399 F.2d 11

7. *Green* v. *New Kent Co.* (U.S. Supr. Ct. 1968) 391 U.S. 430, 20 L.Ed.2d 716; *Monroe* v. *Jackson, Tenn.*, (U.S. Supr. Ct. 1968) 391 U.S. 450, 20 L.Ed.2d 733; *Raney* v. *Gould*, (U.S. Supr. Ct. 1968) 391 U.S. 443, 20 L.Ed.2d 727.

8. *Goss* v. *Knoxville*, (6th Cir. 1969), 406 F.2d 1183; *Freeman* v. *Gould*, (8th Cir. 1969) 405 F.2d 1153; *U. S. A.* v. *Cook County*, (7th Cir. 1969) 404 F.2d 1125; *Deal* v. *Cincinnati*, (6th Cir. 1966) 369 F.2d 55; *Springfield* v. *Barksdale*, (1st Cir. 1965) 348 F.2d 261; *Downs* v. *Bd. of Ed. of Kansas City*, 336 F.2d 988 (10th Cir. 1964), cert. denied 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800 (1965); *Mapp* v. *Bd. of Ed. of Chattanooga, Tenn.*, 373 F.2d 75 (1967); *Clark* v. *Board of Education*, (8th Cir. 1966, 1967) 369 F.2d 661, rehearing denied 374 F.2d 569; *Bell* v. *Gary*, (7th Cir. 1963) 324 F.2d 209, cert. denied 377 U.S. 924

who sat on four panels. The presiding judges upon the other three panels were Judge Dyer, Judge Bell and Judge Ainsworth. Eleven of these decisions were rendered with only two members of this Circuit participating, the third member of the panel being a District Judge.

The recent decisions of the Court of Appeals of the Fifth Circuit conflict directly with decisions of the Sixth Circuit, the First Circuit, the Seventh Circuit, the Eighth Circuit and the Tenth Circuit. They are in direct conflict with provisions of the Civil Rights Act of 1964 and with the Congressional intent expressed last year in the act carrying the appropriation for the Department of Health, Education and Welfare. All of these are hereinafter quoted.

Through a misconstruction both of the "trilogy of cases", *Green*, *Monroe* and *Raney*, and of the en banc decision of *Jefferson II*, many panels of the Fifth Circuit find themselves in direct conflict with decisions of other Circuits. The dicta of *Adams*, repeated in *Hall*, *Hinds County* and other cases, deviates from the teaching of *Green*, *Monroe* and *Raney* as well as that of *Jefferson II*. As we will later point out, the panels have seized upon numerous elements which were considered in combination and separated them, so that each separate element is now made the sine qua non of continuance of freedom of choice. This is also true in the varying definitions of what constitute the "vestiges of a dual school system" that must be removed.

Hinds County, *Hall*, *Indianola*, *Jefferson III* and other decisions have based their destruction of freedom of choice plans upon dicta first appearing in *Adams*:

> If in a school district there are still *all-Negro schools*, *or only a small fraction of Negroes enrolled in white schools*, or no substantial integration of faculties and school activities then, as a matter of law, the existing plan fails to meet constitutional standards as established in Green.

The panel in *Hinds County* rejected freedom of choice as an acceptable plan in any of the thirty districts, saying: (Comp., pages 278-279, 281-2.)

> The record compels the conclusion that to eliminate the dual character of these schools, *alternative methods of desegregation must be employed* which would include such methods as zoning and pairing. . . .
>
> The proper conclusion to be drawn from these facts is clear from the mandate of Adams v. Mathews, supra: "as a matter of law, the existing plan fails to meet constitutional standards as established in Green."
>
> We hold that these school districts *will no longer be able to rely on freedom of choice as the method for disestablishing their dual school systems.*

The Court of Appeals of the Sixth Circuit determined on February 10, 1969, in *Goss v. Board of Education of Knoxville, Tennessee*, 406 F.2d 1183, that the elimination of all-Negro and all-white schools is not a condition precedent to either the establishment of a unitary, nonracial school system, or to the continuation of a freedom of choice plan of desegregation. The Court found that there were five all-Negro schools in the Knoxville school district. It also found that in 1960 the district had "a school system completely and de jure segregated both as to students and faculty". In holding that the Knoxville school system was constitutionally acceptable, the Court of Appeals said:

> Preliminarily answering question 1, it will be sufficient to say that *the fact that there are in Knoxville some schools which are attended exclusively or predominantly by Negroes does not by itself establish that the defendant Board of Education is violating the constitutional rights of the school children of Knoxville.* Deal v. Cincinnati Bd. of Education, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847, 88 S.Ct. 39, 19 L.Ed.2d 114 (1967); Mapp v. Bd. of Education, 373 F.2d

> 75, 78 (6th Cir. 1967). *Neither does the fact that the faculties of some of the schools are exclusively Negro prove, by itself, violation of Brown.*

The Court then discussed the rule set forth in *Green*, including in the statement that the school boards are "charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch". In applying this to the Knoxville District and discussing its effect, the Court of Appeals of the Sixth Circuit said:

> The Court further said that it would be their duty "to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437-438, 88 S.Ct. at 1694. We are not sure that we clearly understand the precise intendment of the phrase "a unitary system in which racial discrimination would be eliminated," *but express our belief that Knoxville has a unitary system designed to eliminate racial discrimination.*

The Court brushed aside the position that different constitutional principles should be applied to southern states where there had been in the past de jure segregation as contrasted to northern states where there had been in the past de facto segregation. This was of particular importance as *Deal* involved formerly de facto segregation and *Goss* involved formerly de jure segregation. The Court said:

> In Monroe v. Bd. of Commissioners, 380 F.2d 955, 958 (6th Cir. 1967), we expressed *our view that the end product of obedience to Brown I and II need not be different in the southern states, where there had been de jure segregation, from that in northern states in which de facto discrimination was a fortuity.* Our observations in that regard were not found invalid by the Supreme Court's opinion reversing our Monroe decision. See Monroe v. Board of Commissioners, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968).

The constitutional principles thus found to be applicable to both southern states and northern states were stated by the Sixth Circuit in *Deal*, cited as supporting authority in *Goss*. *Deal* involved the Cincinnati school system in which de facto segregation had resulted in heavy racial imbalance in the schools.[9] Racial discrimination may be removed by different methods, including freedom of choice plans, validly set up, properly administered, with choices freely exercised without external pressures so that the plan itself (without regard to the statistical results produced by choices thereunder) is constitutionally acceptable. *Hinds County*, *Choctaw*, *Adams* and other decisions actually bottomed solely upon statistics are in direct conflict with both *Goss* and *Deal*. In *Deal* the Sixth Circuit said:

> The cases recognize that the calculus of *equality is not limited to the single factor of "balanced schools"; rather, freedom of choice under the Fourteenth Amendment is a function of many variables* which may be manipulated differently to achieve the same result in different contexts. . . .
>
> *This is in accord with our holding that bare statistical imbalance alone is not forbidden.* There must also be present a quantum of *official discrimination* in order to invoke the protection of the Fourteenth Amendment. . . .
>
> Finally, in the one case in which *a District Court apparently accepted the appellants' theory of racial imbalance*, Barksdale v. Springfield School Comm., 237 F.Supp. 543 (D. Mass. 1965), *the First Circuit, in vacating the decision* and dismissing the complaint without prejudice *specifically rejected any such asserted constitutional right*. Springfield School Comm. v. Barksdale, 348 F.2d 261, 264 (1st Cir. 1965).

9. As detailed below the report to HEW for the school year 1968 revealed that of the 106 schools in the Cincinnati Public School System, forty were composed of students of one race (i.e., more than 99 per cent Negro or 99 per cent white students), of which thirteen schools were Negro and twenty-seven schools were white.

Adams and its progeny, including *Hinds County* and *Hall*, are in direct conflict with *Springfield School Committee* v. *Barksdale*, 348 F.2d 261, rendered by the Court of Appeals of the First Circuit in 1965. The district court found that two of the elementary schools had over 80 per cent Negro pupils, that fourteen elementary schools had no Negro pupils or less than one per cent Negro pupils, and that the school system was racially imbalanced. The Court of Appeals said:

> Having reached its conclusions, the court ordered the defendants to submit a plan to correct racial imbalance in the Springfield schools.

The Court vacated the order of the district court and reversed, stating the constitutional principles as follows:

> Certain statements in the opinion, notably that "*there must be no segregated schools*," suggest an absolute right in the plaintiffs to have what the court found to be "tantamount to segregation" removed at all costs. *We can accept no such constitutional right.* Cf. Bell v. School City of Gary, 7 Cir., 1963, 324 F.2d 209, cert. den. 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216; Downs v. Board of Education, 10 Cir., 1964, 336 F.2d 988, cert. den. 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800. . . .
>
> But more fundamentally, when the goal is to equalize educational opportunity for all students, it would be no better to consider the Negro's special interests exclusively than it would be to disregard them completely.

The hard and fast *Adams* rule, the statistically-based *Hinds County* decision, and like decisions conflict with *United States* v. *Cook County*, 404 F.2d 1125, 1135, decided by the Court of Appeals of the Seventh Circuit on December 17, 1968. The panels of this Circuit have brushed aside good faith. They require hard and fast statistical results *now*. To the contrary, the Court said in *Cook County*:

beer about 400% increase every year in both the
lity, desegregation and the student population de-
egation in schools.

Charles A. Armstrong, Principal of Meridian
igh School, testified as follows:

e 196[illegible] well, *actually since 1953 in Meridian*, we've
involved, but since 1960 direct responsibility of
l beginning, of course, rests upon my shoulders
a lot of other people we involve. I would say
we had the best beginning of this year that we
had in any of the time of which I know about
smooth and orderly. *No report of any harass*
ment, any intimidation. Our teachers and our stu-
on the first day of school are ready to teach and
a smooth beginning of school.

Do the Negro students participate in the same ac-
ties as all the other students?

Yes, sir. There's no regard to race or color here

What about your athletic program?

We have Negro students involved in football,
thall and track and baseball. Our championship
ll team of last year one of the starting members
a young man who played tackle, a 265 pound
ter who attracted a lot of attention with his
ts as an athlete. In basketball, we had two
ers, and there were several, eight or nine stu-
who were out for football. This year, one other
student is a starter on the kicking teams. In
thall, we had two members who made our travel
quad and who both played in varsity and B
team. In other activities, in band, I think we

horus, Thespians, all of our club activities, club
ve sponsors from special interests, and class
ll of these service clubs. I think twelve of these
have Negro members by their choice.

Q. What is your own attitude toward desegregation at this school, Mr. Armstrong?

A. Well, I have no problem with the whole idea. These are children. I'm involved in public education. I think it's awfully important that public education continue. I have no problem whatsoever personally with it at all. And I think that these youngsters need to be treated as human beings with educational problems, and everything that we do is directed to this. *With all our students, now, with Negro and the White. This permeates our organization.*

Q. Do you feel that a true and real free choice is being exercised by the students?

A. I do.

Q. *Do you feel that the freedom of choice plan is working, Mr. Armstrong?*

A. *I certainly do.*

BY THE COURT: *Excuse me, Counsel. Do you know of any plan which be more effective than the freedom of choice plan to accomplish the result that the Supreme Court asked for in the Green case,* that is, to destroy every root and branch of the traditional dual system, and at the same time to accomplish the highest level of educational achievement?

BY THE WITNESS: *I don't know of any such plan that would do this. I think that if it happens and as it happens it'll happen with people wanting it to happen by making choices, for people seeing that the process will work by choice.*

The Enterprise Consolidated School District is one of smallest school districts among these consolidated The undisputed testimony appearing in the record Appendix 21 reveals that 27% of the black students in district attend schools formerly predominantly As the ratio of black students to white students this district is 40% black and 60% white, this is an out-

standing achievement. The projected percentage for the school year 1968-1969 is 30%. This demonstrates the unreliability of the statistics appearing in the Petition for Writ of Certiorari, particularly in Note 3 on page 4 thereof. It is said that such statistics are taken "for the most part" from compilations by the United States submitted to the Court of Appeals. However, it is seen by comparing the statistics utilized by the Court of Appeals (Petitioners' Appendix B, pp. 30a-31a), that only seven of the fourteen school districts now before the Court are included therein. This demonstrates a complete unreliability of the figures or "statistics" utilized in this petition.

We have attached as appendix the pertinent extracts from the evidence applicable to the Yazoo City and Yazoo County School Districts. As these districts are about average size they may also be considered typical.

The testimony of Honorable John Holmes, President of the Board of Trustees of the Yazoo City District, is of material importance. He is the son of a former distinguished member of the Court of Appeals of the 5th Circuit, Judge Edwin Holmes, now deceased. The District Court found concerning all of the school districts in the consolidated cases that the injunction prohibiting any member of the faculty from influencing the choice of any parent or student has constituted a major factor in preventing more mixing under the freedom of choice plan (See Petitioners' Appendix A, pp. 4a-5a).

In response to a question concerning such provision of the injunction, Mr. Holmes testified that this particular provision, in his opinion, had destroyed the ability of the school officials to obtain greater numbers of transfers by the students to schools in which their race is in the minority (See Appendix 1 hereto). This record also demonstrates that the one statistic chosen by the Petitioners con-

veys a false picture of the actual accomplishments under the freedom of choice plans.

The one statistic utilized in the petition for Writ of Certiorari is very misleading. An illustration is the fact that in the formerly white Bentonia School the percentage of Negro students to total enrollment averages 15.8% and five grades have more than 20%. In the formerly white Bentonia School the percentage of Negro students varies in the several grades, averaging 10 1/2%. Other evidence appears in the record demonstrating a true compliance with Constitutional requirements.

The Natchez Special Municipal School District is a defendant in one of the 25 consolidated cases. Although not now before this Court, it is typical of the 19 school districts necessarily affected by the determination of the pending proceeding.

The Opinion of the District Court rendered on May 16, 1969 (at p. 9a of Petitioners' Appendix), made a finding concerning the Natchez schools. The Court of Appeals did not disturb this finding in its opinion of July 3, 1968 (appearing at p. 28a of Petitioners' Appendix). Such finding by the District Court is as follows:

> The Natchez schools, appearing as Civil Action No. 1120(W), have demonstrated outstanding progress with the freedom of choice plan. These schools accommodate approximately 10,400 children, 55% of whom are Negro and 45% of whom are white. There are 40 Negro teachers in the predominantly white schools and 53 white teachers in the predominantly Negro schools. There are 456 Negro children in the predominantly white schools. There are 40 white and 70 Negro children in the vocational schools. A Negro is on the school board. All decisions of the school board have been unanimous. It is the view of the Court

in this case that these schools have shown satisfactory and acceptable progress under all of the facts and circumstances in complying with all of the requirements of the model decree. In this case, as in all of these cases, the bare figure statistics are misleading and tell only part of the story.

The evidence introduced at the August 21-22, 1968, hearing discloses that in the Natchez Special Municipal Separate School District (herein referred to as Natchez) does not operate a dual system of schools. All of the schools in the Natchez system are fully and equally accredited by the two Mississippi Accrediting Commissions and by the regional agency known as the Southern Association of Schools and Colleges. All schools in the Natchez system are comparable as to facilities, per pupil expenditure, teacher-pupil ratio and curricula. The Instructional Materials Center for all schools, including library and teaching aid materials, is operated from a central office. The transportation system is desegregated and is operated from a central office, with buses scheduled for the convenience of all students equally. A transportation system within the Natchez city limits, supported entirely by local funds, is operated in order to make the freedom of choice plan more effective.

The Natchez freedom of choice plan is working effectively to accomplish desegregation. *The Natchez school board is composed of members of both races and has never had a dissenting vote on any issue involving school desegregation.* The administrative staff is desegregated. Forty Negro teachers teach in the white schools and 53 white teachers teach in the Negro schools on a permanent half-day basis. Of the 16 attendance centers nine are integrated. Eight of these are predominantly white and one is predominantly Negro. In at least one predominantly white school there are approximately 30% Negro students

in attendance. In the predominantly Negro school which is desegregated, there are approximately 40% white students in attendance. Integration among students of the district increased approximately 100% from the 1967-68 school year to the 1968-69 school year.

All faculty and staff meetings are integrated, and all in-service workshops are integrated. Athletic programs at the various schools are integrated and students of both races are on the squads at the mixed schools.

This extensive integration and complete desegregation has taken place during the two and one-half years since the freedom of choice plan was inaugurated. This is particularly remarkable in view of the "near state of anarchy" which had existed at Natchez during recent months referred to in the District Court's order dated January 28, 1966. During 1965 the District Court rendered its findings of fact and conclusions of law as to Natchez, reciting:

> The City of Natchez and Adams County, Mississippi, are now and have, for the past two months, been subjected to unusual racial tension and unrest. Demonstrations, boycotts, and riots have been and are being threatened, and the situation recently developed to the extent that the National Guard was ordered into said City to protect persons and property against violence.

PRAYER

Petitioners pray that upon the issuance of a writ of certiorari the hearing thereof be expedited as rapidly as is consistent with the filing in this Court of the full records, preparation of transcripts of proper portions thereof and complete briefing by the attorneys for the parties.

Respectfully submitted, this 8th day of October, 1969.

A. F. SUMMER
Attorney General for the
State of Mississippi

JOHN C. SATTERFIELD
Attorney

IN BEHALF OF

CALVIN R. KING, Attorney for Holmes County Board of Education, et als., Civil Action No. 2779(J) in the District Court;

BRIDGFORTH & LOVE; CAMPBELL & CAMPBELL; SATTERFIELD, SHELL, WILLIAMS AND BUFORD, Attorneys for The Yazoo City Municipal Separate School District, The Yazoo County Board of Education and The Holly Bluff Line Consolidated School District, Civil Action No. 1209(W) in the District Court;

HAROLD M. DAVIDSON, Attorney for Leake County School Board, et als., Civil Action No. 3382(J) in the District Court;

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Line Consolidated School District, et als., and The Sharkey-Issaquena Line Consolidated School District, et als., Civil Action No. 1096(W) in the District Court;

TALLY D. RIDDELL and ROBERT H. COVINGTON, Attorneys for The Enterprise Consolidated School District, et als., The Quitman Consolidated School District, et als., and The Clarke County Board of Education, et als., Civil Action No. 1302(E) in the District Court;

THOMAS H. WATKINS, JOHN ROACH and RICHARD WATSON, Attorneys for North Pike Consolidated School District, Civil Action No. 2807(J) and Wilkinson County School District, Civil Action No. 1160(W) in the District Court;

WILLIAM B. COMPTON, Attorney for The Meridian Separate School District, et als., Civil Action No. 1300(E) in the District Court;

W. A. ALLAIN, Assistant Attorney General for the State of Mississippi, Attorney for all Respondent School Districts;

JOE R. FANCHER and ROBERT GOZA, Attorneys for The Canton Municipal School District, et als., and The Madison County School District, et als., Civil Action No. 3700(J) in the District Court.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief in Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Including Objections to Petition with Motion to Advance, and Cross-Petition for Writ of Certiorari with Motion to Expedite Hearing, were served on the Petitioners on this 8th day

of October, 1969, by mailing copies of same, postage prepaid, to their counsel of record at the last known address as follows:

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EXHIBIT A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 28030 and 28042

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

HINDS COUNTY SCHOOL BOARD, ET AL.,
Defendants-Appellees.

(Civil Action No. 4075(J))

(The Remaining 24 Consolidated Cases Are Also Captioned but Not Listed Here.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

PETITION FOR REHEARING IN BANC AND FOR STAY OF PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, OR, IN THE ALTERNATIVE, FOR RECALL OF MANDATE OF THIS COURT

TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE JUDGES THEREOF:

It is the understanding of counsel for all of the appellees that the foregoing entitled causes were consolidated

by this Court for the purpose of the hearing on appeal, even though counsel have not been furnished with copy of any such order, if such be in existence. Each of the school districts involved is represented by separate counsel, even though there are some counsel that represent more than one of the districts. The facts in each district differ from the facts in the other districts and the issues presented vary with each district. Nevertheless, there are some basic general issues that are common to all of the appellee school districts. Therefore, counsel for appellee school districts have concluded that only one petition should be filed covering these general basic issues that are common to all districts, rather than have separate petitions filed for each of the appellee school districts. Accordingly, this petition is filed on the assumption that the Court will accept this petition as being applicable to all of the appellee school districts, even though it is not signed by the counsel of record for each of the appellee school districts.

This petition for a rehearing of the above entitled causes is being filed with the belief and conviction that it is essential that the issues presented herein receive full and complete consideration by this Court in banc, the proceedings in the district court must be stayed or the mandate of this Court recalled. This petition is being filed in accordance with Rule 40 and Rule 35 of the Rules of Appellate Procedure, and in support of this petition, your petitioners assert as follows:

1. The appellees have not been accorded due process of law in this appeal.

2. Various panels of this court have not been consistent in their interpretation and application of the decision of this Court rendered, in banc, in *United States of*

America v. *Jefferson County Board of Education*, 380 F.2d 385, and this Court, sitting in banc, should establish what was meant by the in banc decision of this Court in the *Jefferson* case, *supra*.

3. Various panels of this Court have not been consistent in their interpretation and application of the decisions of the United States Supreme Court in *Green* v. *County School Board of New Kent County, Virginia*, 319 U.S. 430, 20 L.Ed.2d 716, 88 S.Ct. 1689; *Raney* v. *Board of Education of Gould School District*, 391 U.S. 433, 20 L.Ed.2d 727, 88 S.Ct. 1697; and *Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee*, 391 U.S. 450, 20 L.Ed.2d 733, 88 S.Ct. 1700; and this Court, sitting in banc, should make an interpretation and application of those decisions of the United States Supreme Court that can be uniformly applied.

4. These proceedings involve questions of exceptional importance.

This is a petition, not a brief, and there should not be, and therefore will not be, any extended discussion of the issues involved. It is our intent and purpose, however, to set forth sufficient of the issues to illustrate and demonstrate the need for the grant of the relief sought by this petition.

1. The Appellees Have Not Been Accorded Due Process of Law in This Appeal.

The chronology of events in connection with the appeal to this Circuit is as follows:

A. The district court, consisting of three judges, for the Southern District of Mississippi, sitting in banc, rendered its opinion on May 13, 1969.

B. The district court entered its order pursuant to the foregoing opinion on or about May 16, 1969 in each of the above referenced cases.

C. On May 28, 1969, the district court entered additional findings of fact.

D. Attorneys for the private plaintiffs filed notice of appeal and a motion for summary reversal on June 10, 1969.

E. The United States of America filed notice of appeal on June 12, 1969 in the cases where the United States of America was plaintiff but filed no motion for summary reversal in connection with said notice of appeal.

F. On June 10, 1969, notice was issued by the Clerk of the United States Court of Appeals for the Fifth Circuit to the attorneys for the school districts in which there were private plaintiffs, that the motion for summary reversal would be presented for ruling without oral argument on or about June 20, 1969, together with any response or opposition that may be filed by opposing counsel by that date.

G. On June 23, 1969, the United States of America filed a "Motion for Summary Reversal and Motion to Consolidate Appeals, etc." in the cases in which the United States of America was plaintiff.

H. On June 23, 1969, the Clerk of the United States Court of Appeals for the Fifth Circuit mailed a letter to counsel of record to the effect that the motion of the United States of America had been filed and would be presented on or about July 3, 1969 together with any response or opposition that may be filed by opposing counsel by that date. This notice was received by some of the counsel on June 24, 1969 and other counsel on later dates.

I. On June 24, 1969, the district court entered an "order as to the appellate record" in which the district court recognized that the record in these cases was voluminous and that it would be "a Herculean task for the appellate court to examine such a voluminous record in any reasonable length of time". Accordingly, the district court ordered that appellants' counsel was to file with the Clerk of the court within five days a designation of so much of the record in each of the cases that they desired to be used in the appeal. The district court further ordered that within three days after receipt of a copy of such designation by appellants' counsel, appellees' counsel was to file a designation of those parts of the record not previously designated which they deemed necessary for use on appeal. The court further ordered that the Clerk should have thirty days in which to prepare the record and to forward same to the Clerk for the Court of Appeals for the Fifth Circuit in New Orleans.

J. On June 25, 1969, the Clerk of the United States Court of Appeals for the Fifth Circuit addressed a letter to counsel of record in all cases, including those in which there were private plaintiffs and those in which the plaintiff was the United States of America, to the effect that the Court would hear oral argument on all of these cases "on the motion for summary reversal and the *merits* in all of the cases both private plaintiffs and those of the United States". (Emphasis added). This letter further advised that the argument would be held in New Orleans beginning at 9:30 A.M., July 2, 1969, and any memoranda or responses would have to be filed in the office of the Clerk by noon, July 1, 1969. In this letter, it was recited that the Court had taken notice of the district court's order with respect to the record but that since appeal was being expedited on the original record, the United States attorney

should make arrangements with the District Clerk to transmit to the Clerk of the Court of Appeals the entire record of the district court so that same would be available to the Court if needed during the argument and summation. It was further stated that the Court recognizes that "this is a huge record involving a large number of parties and matters of great public interest and importance".

K. The foregoing letter dated June 25, 1969 was received by some of the counsel of record on June 26, 1969 and by others on June 27, 1969. This meant that counsel had, at best, Friday June 27, Saturday June 28, Sunday June 29 and Monday June 30 to prepare any response, since it had to be filed by noon, July 1, 1969.

L. Briefs filed by the United States of America were received by some of the counsel on Monday, June 30, 1969 and by others on Tuesday, July 1, 1969. In addition, supplements to the brief were delivered to counsel on the morning of the hearing, July 2, 1969. Thus, counsel were afforded no opportunity whatsoever to examine or inspect same in order to reply thereto either in writing or orally.

M. The proposed opinion-orders as submitted by the private plaintiffs and the United States of America were not submitted to nor seen by opposing counsel until the morning of the hearing, July 2. Accordingly, there was no opportunity to examine same or make any meaningful comments in regard thereto.

N. The record in the district court was brought into the courtroom and was present during the argument on July 2. It is the understanding of counsel that this record consisted of four large packing boxes and that these boxes were still sealed as same had been sealed by the Clerk of the district court and remained sealed during the entire argument.

O. The oral argument of counsel was concluded during the middle of the afternoon on July 2.

P. The opinion of the panel of this Court was entered July 3, 1969, applying to all of the cases.

It is submitted that the record in these cases has not been examined by any member of the Fifth Circuit Court of Appeals. Yet, on July 1, 1969, another panel of the Fifth Circuit in Cause No. 27281, styled *United States of America* v. *Board of Education of Baldwin County, Georgia,* rendered an opinion in which it was stated as follows:

> "In the case now before the Court, we conclude, after a study of the record, that the district court correctly decided that a freedom of choice plan was more suitable than a zoning plan for Baldwin County, Georgia. We base this conclusion on the county's racial residential patterns, the location of the schools and the projections for 1969-70."

Thus, we have a clearcut illustration and demonstration of, in one case, a panel of this Court examining the record of a case and, after analysis of the facts of that particular case, reaching a conclusion. No consideration was given by the panel deciding these cases as to the facts as they exist in any of these cases other than bare statistics; and, in the panel's opinion which purported to cover statistics in each of the districts involved, the Court omitted any findings of statistics as to a number of the school districts which were appellees.

2. Various Panels of This Court Have Not Been Consistent in Their Interpretation and Application of the Decision of This Court Rendered, In Banc, in United States of America v. Jefferson County Board of Education, 380 F.2d 385, and This Court, Sitting In Banc, Should Establish What Was Meant by the In Banc Decision of This Court in the Jefferson Case, Supra.

(The discussion under this point is omitted as the entire Petition is a part of the Record in the Supreme Court of the United States.)

3. Various Panels of This Court Have Not Been Consistent in Their Interpretations and Application of the Decisions of the United States Supreme Court in Green v. County Board of Education of New Kent County, Virginia, 319 U.S. 430, 20 L.Ed.2d 716, 88 S.Ct. 1689; Raney v. Board of Education of Gould School District, 391 U.S. 433, 20 L.Ed.2d 727, 88 S.Ct. 1697; and Monroe v. Board of Commissioners of the City of Jackson, Tennessee, 391 U.S. 450, 20 L.Ed.2d 733, 88 S.Ct. 1700; and This Court, Sitting In Banc, Should Make an Interpretation and Application of Those Decisions of the United States Supreme Court That Can Be Uniformly Applied.

The United States Supreme Court in the *Green* case, *supra*, *Raney* case, *supra*, and *Monroe* case, *supra*, clearly enunciated the basic principles that the Constitution requires all districts to be operated on a unitary, nonracial, nondiscriminatory basis and that, in districts having a history of *de jure* segregation, the school boards operating such school systems were required to effectuate a transition to a racially nondiscriminatory school system. In this context, the Supreme Court stated that steps must be taken in which racial discrimination would be eliminated, root and branch. These decisions, it is submitted, clearly establish that each school district of the nation

must be operated as a unitary, nonracial, nondiscriminatory school district and that, in districts that have a history of *de jure* segregation, the trustees of the school district have the affirmative duty of "eradicating the last vestiges of the dual system". The confusion and misunderstanding now rampant in this Circuit grows out of the interpretation and application of these basic concepts. It is essential that this confusion be eliminated. Literally hundreds of thousands of children are involved, as well as the entire educational system. The interpretation and application of these basic concepts, it is submitted, is probably the most important question facing the courts of this nation today. Involved in the answer to this question is whether the schools will be operated, in their day to day operations, by a federal department under the supervision and guidance of the federal judiciary, or whether the officials of the districts can, through qualified educators, operate the schools in conformity with the concepts of the applicable provisions of the Constitution as defined by the courts.

The two concepts are as follows: (A) a unitary, nonracial, nondiscriminatory school system, and (B) the vestiges of a dual system which must be removed by the trustees of the school districts. We will briefly discuss these two concepts with the thought in mind of at least demonstrating the necessity for a clearcut, understandable judicial definition—a definition that is based upon constitutional principles and not upon the changing guidlines of a department of the executive branch of our government dealing with the expenditure of funds.

A. What is a unitary, nonracial, nondiscriminatory school system?

It is submitted that the answer to this question is not too difficult. It is a school system which is open and free

to all pupils and in which race is not a factor. In fact, if it is to be "nonracial", then it is a contradiction on its face to take action that is motivated by the race of the pupil. One panel of the Fifth Circuit has given a definition in the *Broussard* case, *supra,* as follows:

> ". . . it would appear than an 'integrated, unitary school system' is provided where every school is open to every child. It affords 'educational opportunities on equal terms to all.' That is the obligation of the Board."

This Court in the *Jefferson* decision, *supra,* in banc, stated as follows:

> "The governmental objective of this conversion is—educational opportunities on equal terms to all."

It is submitted that this concept is clear, can be followed and implemented by school trustees of all school districts. The school districts throughout the nation, whether they have a history of *de jure, de facto,* or no segregation at all, must be operated on a unitary, nonracial basis. This is easily understood and can be easily implemented by the trustees that are acting in good faith. If the trustees are not acting in good faith, such can be easily demonstrated to and corrected by the district court and will not require that the federal courts become involved in the day to day operations of the schools in the school districts.

It is submitted that, if this Court *in banc* expressly adopts the definition of a unitary, nonracial, nondiscriminatory school system as succinctly set out in *Broussard, supra,* which, with deference, it ought to do, then the only problem which would remain would be to properly deal with the second concept.

B. What are the vestiges of the dual system which must be eradicated by the trustees of the school districts?

Quite frankly, it would also appear that the answer to this question should not be too difficult. It is submitted, however, that some of the recent decisions of various panels of this Court have made requirements of school districts that are *not* in keeping with the obligation to remove the vestiges of the dual system and have thereby created confusion and consternation concerning the meaning of this obligation.

Our discussion here will be based upon the assumption that we are correct in that the obligation of the trustees of the school districts located in formerly *de jure* segregated states is the affirmative duty to eradicate the last vestiges of the dual system. If this be true, then these vestiges must be identified and eradicated. It is not enough to operate a unitary system at this time. These trustees must go further and eradicate or eliminate any vestiges of the dual system.

Illustrative of the points we are attempting to make here is the decision by a panel of this Court in the *Adams* case, *supra*. The panel in the *Adams* case, *supra*, with no record before it, and with no opportunity being offered counsel to be heard, made a specific finding that an all-Negro school was a vestige of the dual system and must be eradicated in all districts in the Fifth Circuit. Since that time, the language in the *Adams* decision, *supra*, has been quoted by several panels of this Court. Insofar as we know, however, no case has ever been presented to this Court which contained facts which would support a finding that this is a vestige of a dual system. A study of the history of litigation in this field indicates that the "racial statistics" approach as a measuring device for determining whether the last vestiges of the dual system have been removed originated with the office of Health,

Education and Welfare. That office promulgated guidelines which contained statistical requirements to be used in determining whether funds would be made available to the various school districts. It is submitted that this approach has been adopted by some of the panels in this Circuit as a constitutional requirement, when, as a matter of fact, the office of Health, Education and Welfare has no authority to make constitutional interpretations that are binding on the courts and that office had no hearing or proof upon which to reach such a conclusion in the first place. Certainly the decisions of this court should be supported by proof.

If it be assumed that the Fifth Circuit has found, without the benefit of any proof of any kind, that an all-Negro school constitutes a vestige of the dual system, then we think it important that this Court's attention be called to the case of *Goss* v. *Board of Education of Knoxville, Tennessee,* 406 F.2d 1183 (decided February 10, 1969). In the *Goss* case, *supra,* the Court of Appeals for the Sixth Circuit specifically found and adjudicated that:

> "The fact that there are in Knoxville some schools which are attended exclusively or predominantly by Negroes does not by itself establish that the defendant Board of Education is violating the constitutional rights of the school children of Knoxville. . . . Neither does the fact that the faculties of some of the schools are exclusively Negro prove, by itself, violation of *Brown.*"

We do not know the extent of the proof, if any, on this particular point that was in the record in the Goss case; however, for purposes of presenting the point here being discussed we are assuming that there was *no actual* proof before the court and that the Sixth Circuit, like the Fifth Circuit, has made a finding based on taking judicial notice.

The situation is, therefore, that we have Courts of Appeal for different circuits reaching opposite conclusions based on judicial notice and without the benefit of any actual proof in the record on which these conclusions could be based.

In these proceedings now before this Court, there is proof, which was uncontradicted, that the existence of all-Negro schools is *not* a vestige of the dual system. In addition, there has been filed in the Fifth Circuit statistical information taken from the official records of the office of Health, Education and Welfare showing the racial composition of schools in the one hundred largest school districts in this nation. Most of these districts have never had a dual system. These statistics show, and we submit this is conclusive, that all-white and all-Negro schools exist in every school district where there is a large percentage of both white and Negro pupils. These statistics show, beyond question, that all-white and all-Negro schools do exist in school districts that have never had a dual system. As a matter of fact, of the 12,497 schools in these one hundred school districts, assuming that a school with less than one percent of the minority race is an all-Negro or all-white school, 6,137 are either all-white or all-Negro. In other words, over forty-eight percent of the schools in the one hundred largest school districts in this nation are either all-white or all-Negro. Most of these districts are in areas that have never had a dual system. We submit, therefore, that for this Court to adjudicate that the existence of an all-Negro or an all-white school is, in and of itself, a vestige of the dual system is without support of any proof, is incorrect, and is clearly erroneous.

It is submitted that such a finding by a panel of this Court is not in keeping with the opinion of this Court in

the in banc *Jefferson* decision. The language of this Court in *Jefferson*, sitting in banc, was that there was to be "no Negro schools and no white schools—just schools". This language of this Court in its in banc decision is in accord with the obligation of the school trustees to operate a unitary school system. The schools are not to be Negro schools nor are they to be white schools. They are to be just schools. This does not, however, mean that there must be both white and Negro pupils in attendance at each and every school. Since the existence of schools at which only Negroes attend, or the existence of schools at which only whites attend is *not*, in and of itself, a vestige of the dual system, then there is no constitutional basis on which the courts may or can require their elimination or eradication as being a vestige of the dual system.

For the benefit of this Court, we are attaching as Exhibit "A" to this petition the report of Peat, Marwick, Mitchell and Company, dated June 27, 1969, which, it is submitted, is self-explanatory.

In addition to the foregoing, there is in this record testimony of experts which demonstrates conclusively that (1) all-Negro or all-white schools are not vestiges of the dual system and (2) a definite or specific amount of integration of the races in the schools is not an indication or even proof that the schools are operated on a unitary basis with the vestiges of the dual system eliminated or eradicated—at best, it is only peripherally relevant to the issues.

This evidence also stands uncontradicted and will be discussed and presented in full, if this petition is granted and this Court hears these cases in banc.

What we have stated concerning pupils is equally applicable to faculties. The proof is that an all-Negro fac-

ulty or an all-white faculty is not, in and by itself, a vestige of the dual system and does not destroy the unitary nature of the school system.

Other illustrations could be given. It is submitted, however, that the foregoing discussion points up the absolute necessity of this Court, in banc, determining the issues presented by these cases. We feel that this is particularly true in view of the fact that some of the panels of this Court, without the benefit of a record, have adjudicated that all-Negro schools cannot exist, while other panels of this Court have, upon review of the record, permitted all-Negro schools to exist.

4. The Decision of This Panel Is Contrary to the Civil Rights Act of 1964 and other Federal Statutes Enacted under Authority of Section 5 of the Fourteenth Amendment.

(The discussion under this point is omitted as the entire Petition is a part of the Record in the Supreme Court of the United States.)

5. This Is a Case of First Impression in Which It Has Been Proved by Competent Evidence Admitted by the District Court and by the Court of Appeals That Freedom of Choice Is the Most Promising Course of Action to Bring About Meaningful and Lasting Desegregation.

(The discussion under this point is omitted as the entire Petition is a part of the Record in the Supreme Court of the United States.)

6. Recall of the Mandate or Stay of Further Proceedings by the District Court Is Necessary If Justice Is to Be Done in These Twenty-Five Cases.

(The discussion under this point is omitted as the entire Petition is a part of the Record in the Supreme Court of the United States.)

CONCLUSION

It is respectfully submitted that it is *essential* that the relief sought herein be granted. Not only are the school districts included in this proceeding vitally affected —but every district in this Circuit. In some of the larger districts, the eradication of schools attended only by Negroes or only by whites will be an impossibility—yet, this, according to a panel of this Court, is unconstitutional. Obviously, this holding is, in effect, a holding that the Constitution requires one thing in one school district and an entirely different thing in another school district. *If an attempt is made to justify such inconsistency by referring to the factual situation in the respective school districts, then the fact is that the record in these cases was not even examined to attempt to determine the facts.*

If the courts are to require the trustees and boards of education to take action that is not based upon constitutional concepts, then the courts will have launched into the detailed operations of the schools of this Circuit which will become only more involved and to which there will be no end. The issues here presented are vital and should receive the attention of this full Court, sitting in banc. Until this has been done and the decision made after full consideration, the action of the district court in these cases should be stayed or the mandate should be recalled. The actual continued existence of a responsible public educational program may be involved in many of the districts in this Circuit.

EXHIBIT TO PETITION FOR REHEARING IN BANC

PEAT, MARWICK, MITCHELL & CO.
Certified Public Accountants
Post Office Box 690
1232 First National Bank Building
Jackson, Mississippi 39205

Mr. Robert C. Cannada
Attorney-at-Law
Jackson, Mississippi

Dear Sir:

In accordance with your request we have prepared the attached schedule which reflects an analysis of student enrollment and professional instructional staff of the one hundred largest school districts, based on student enrollment, in the United States.

The information contained in the schedule was summarized from data obtained by our personnel from Office for Civil Rights forms OS/CR 102-1 and OS/CR 101 or from data processing cards or tapes filed in lieu of the specified forms, which are on file with the U. S. Department of Health, Education and Welfare, Washington, D. C.

The above mentioned forms which were required, under Title VI of the Civil Rights Act of 1964, to be filed by each school district by October 15, 1968 contain generally the following information:

Form OS/CR 102-1, Individual School Report:

School enrollment, with breakdown of minority group membership

Professional instructional staff, with breakdown of minority group membership

Form OS/CR 101, School System Report:

Summary of information contained in individual school reports for district related schools

As instructed by you we did not ascertain whether the school system reports agreed with the combined total of the individual school reports for each district.

The figures reflected in columns 1, 2, 4, 9 and 10 of the attached schedule were taken from the school system reports (Form OS/CR 101) and the figures in columns 5, 6, 7, 8, 12, 13, 14, and 15 were summarized by us from the individual school reports (Form OS/CR 102-1). As instructed by you we considered all students and staff members not designated as minority group members on the forms to represent white students and white instructional staff.

The school districts listed in the schedule were represented to us by the Department of Health, Education and Welfare to be the one hundred largest in the United States. We did not attempt to verify the correctness of this representation.

In our opinion, the accompanying schedule fairly sets forth the analytical data as to student enrollment and professional instructional staff of the school districts listed therein as extracted from the above referenced documents.

/s/ Peat, Marwick, Mitchell & Co.

June 27, 1969

Analysis of Student Enrollment and Professional Instructional Staff of One Hundred Largest School Districts

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column
	STUDENTS							
	Enrollment							
District	White	Negro	Total White and Negro Enrollment	Total Schools in District	No. of Schools in Which No White Students are Enrolled	No. of Schools Having Less Than 1% White Enrollment	No. of Schools in Which No Negro Students are Enrolled	No. of Schools Having Less Than 1% Negro Enrollment	White
Chicago Public Schools, Chicago, Ill.	219,478	308,266	527,744	610	141	67	132	52	15,67
Fort Wayne Community Schools, Fort Wayne, Ind.	35,377	5,760	41,137	56	-	-	8	13	1,75
Indianapolis Public Schools, Indiana	72,010	36,577	108,587	119	6	11	18	17	3,46
Des Moines Community Schools, Iowa	42,425	3,611	46,036	81	-	-	14	22	2,05
Jefferson Co. Schools, Louisville, Kentucky	82,354	4,109	86,463	82	-	1	33	21	3,63
Louisville Indep. Schools, Kentucky	29,702	25,470	55,172	65	2	5	7	3	1,75
East Baton Rouge Schools, Louisiana	39,770	23,753	63,523	102	34	2	18	17	2,00
Calcasieu Parish School Board, Lake Charles, La.	29,104	9,934	39,038	73	21	-	13	12	1,36
Anne Arundel Co. Schools, Annapolis, Maryland	56,457	8,923	65,380	90	-	-	6	9	2,74
Baltimore City Public Schools, Maryland	66,997	125,174	192,171	204	63	26	10	11	3,85
Montgomery Co. Public Schools, Rockville, Md.	113,630	4,872	118,502	173	-	-	9	51	5,57
Baltimore Co. Board of Ed., Baltimore, Md.	119,378	4,299	123,677	160	-	-	38	40	5,97
Prince George Co. Board of Ed., Marlboro, Md.	124,663	22,313	146,976	210	5	1	20	39	6,13
Boston School Department, Massachusetts	64,500	25,482	89,982	196	1	10	30	15	4,84
Detroit Public Schools, Michigan	115,225	176,478	291,703	302	20	47	18	13	7,66
Special School Dist. No. 1, Minneapolis, Minn.	62,490	5,255	67,745	98	-	-	19	23	3,30
Indep. School Dist. No. 625, St. Paul, Minn.	46,686	2,917	49,603	83	-	-	22	18	2,07
St. Louis City School Dist., Mo.	41,806	73,408	115,214	164	62	21	25	6	2,12
Kansas City School Dist., Mo.	39,510	34,692	74,202	99	7	12	18	6	1,04
Omaha Public Schools Dist. No. 1, Neb.	49,932	11,284	61,216	95	-	2	22	24	2,37
Newark Public Schools, Newark, N. J.	13,716	55,057	68,773	80	10	17	-	-	2,83
Clark Co. School Dist., Las Vegas, Nev.	56,723	8,233	64,956	86	-	1	20	18	2,64
Jersey City School Dist., N. J.	16,457	15,998	32,455	35	1	1	-	3	1,51
Albuquerque Public School System, N. M.	47,710	1,897	49,607	110	-	1	25	36	2,77
Charlotte - Mecklenburg Schools, N. C.	58,623	24,241	82,864	112	14	6	16	12	2,91
Winston-Salem/Forsyth Co., Winston-Salem, N. C.	35,975	13,798	49,773	67	14	-	11	10	1,57
Oklahoma City Public School Dist., I-89, Okla.	58,472	16,255	74,727	115	3	12	45	21	2,42
Portland Public Schools, Oregon	71,331	6,463	77,794	115	-	-	9	31	3,47
Independent School Dist. No. 1, Tulsa, Okla.	66,413	9,728	76,141	105	6	2	52	21	2,88
Pittsburgh City School Dist., Pa.	46,005	29,898	75,903	113	6	7	9	4	3,10
Charleston Co. School Dist., Charleston, S. C.	30,351	16,730	47,081	73	29	-	5	1	1,34
Richland Co. School Dist., Columbia, S. C.	21,387	18,735	40,122	63	20	4	4	3	1,14
Greenville Co. Schools, Greenville, S. C.	43,853	12,453	56,306	103	20	1	19	19	1,97
Shelby Co. School Dist., Memphis, Tenn.	29,618	14,281	43,899	51	17	1	8	8	1,16
Memphis City School System, Tenn.	58,271	67,395	125,666	128	43	4	28	13	2,84
Metro. Nashville-Davidson Co. Schools, Tenn.	71,039	22,561	93,600	142	14	1	29	18	3,16
Austin Indep. School Dist., Texas	33,934	7,783	41,717	67	3	4	11	19	2,20
Corpus Christi School Dist., Texas	21,097	2,496	23,593	60	3	3	20	17	1,72
Dallas Indep. School Dist., Texas	97,888	49,235	147,123	173	17	9	79	12	5,11
El Paso Indep. School Dist., Texas	26,294	1,804	28,098	62	3	3	5	18	2,32
Fort Worth Indep. School Dist., Texas	58,011	21,398	79,409	118	15	3	45	11	2,86
Birmingham Public Schools, Ala.	32,278	34,156	66,434	102	41	2	15	6	1,21

and Professional Instructional Staff
rgest School Districts

3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
	STUDENTS					PROFESSIONAL INSTRUCTIONAL STAFF						
te o t	Total Schools in District	No. of Schools in Which No White Students are Enrolled	No. of Schools Having Less Than 1% White Enrollment	No. of Schools in Which No Negro Students are Enrolled	No. of Schools Having Less Than 1% Negro Enrollment	White	Negro	Total White and Negro	No. of Schools Having No White Instructional Staff Members	No. of Schools Having Less Than 20% White Instructional Staff Members	No. of Schools Having No Negro Instructional Staff Members	No. of Schools Having Less Than 20% Negro Instructional Staff Members
4	610	141	67	132	52	15,678	7,825	23,503	8	80	228	109
7	56	-	-	8	13	1,753	74	1,827	-	-	31	20
7	119	6	11	18	17	3,467	1,009	4,476	-	3	1	74
6	81	-	-	14	22	2,059	44	2,103	-	-	52	28
3	82	-	1	33	21	3,638	70	3,708	-	-	61	19
2	65	2	5	7	3	1,759	775	2,534	1	9	2	37
3	102	34	2	18	17	2,005	973	2,978	17	17	20	46
8	73	21	-	13	12	1,361	408	1,769	14	1	44	8
0	90	-	-	6	9	2,747	382	3,129	-	-	9	60
1	204	63	26	10	11	3,859	4,350	8,209	29	56	2	41
2	173	-	-	9	51	5,579	296	5,875	-	-	51	114
7	160	-	-	38	40	5,977	263	6,240	-	1	73	80
6	210	5	1	20	39	6,132	972	7,104	-	5	35	123
2	196	1	10	30	15	4,841	234	5,075	-	1	108	78
3	302	20	47	18	13	7,669	4,830	12,499	1	6	9	92
5	98	-	-	19	23	3,309	122	3,431	-	-	52	43
3	83	-	-	22	18	2,070	40	2,110	-	-	59	21
4	164	62	21	25	6	2,128	2,455	4,583	48	28	33	34
2	99	7	12	18	6	1,049	1,959	3,008	1	12	13	46
5	95	-	2	22	24	2,373	160	2,533	-	-	72	13
3	80	10	17	-	-	2,834	1,240	4,074	-	-	1	23
5	86	-	1	20	18	2,646	136	2,782	1	-	48	32
3	35	1	1	-	3	1,511	205	1,716	-	-	4	27
7	110	-	1	25	36	2,774	41	2,815	-	-	83	27
4	112	14	6	16	12	2,910	961	3,871	14	7	-	79
3	67	14	-	11	10	1,576	606	2,182	-	13	-	46
7	115	3	12	45	21	2,424	544	2,968	-	2	5	82
4	115	-	-	9	31	3,479	123	3,602	-	-	80	32
1	105	6	2	52	21	2,887	377	3,264	1	-	2	92
1	113	6	7	9	4	3,109	428	3,537	-	-	49	42
	73	29	-	5	1	1,345	597	1,942	10	15	21	23
	63	20	4	4	3	1,149	679	1,828	4	19	15	23
1	103	20	1	19	19	1,976	469	2,445	13	8	64	17
1	51	17	1	8	8	1,161	548	1,709	1	2	-	14
1	128	43	4	28	13	2,841	2,276	5,117	5	38	2	69
1	142	14	1	29	18	3,169	853	4,022	-	15	39	68
	67	3	4	11	19	2,204	369	2,573	-	7	11	43
	60	3	3	20	17	1,729	60	1,789	-	-	22	36
	173	17	9	79	12	5,112	1,665	6,777	21	10	128	6
	62	3	3	5	18	2,321	69	2,390	-	1	39	22
	118	15	3	45	11	2,864	852	3,716	9	12	69	21
	102	41	2	15	6	1,213	1,189	2,402	22	24	-	50

Analysis of Student Enrollment and Professional Instructional Staff of One Hundred Largest School Districts, Continued

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Col
	STUDENTS								
	Enrollment								
District	White	Negro	Total White and Negro Enrollment	Total Schools in District	No. of Schools in Which No White Students are Enrolled	No. of Schools Having Less Than 1% White Enrollment	No. of Schools in Which No Negro Students are Enrolled	No. of Schools Having Less Than 1% Negro Enrollment	White	Ne
Jefferson Co. Schools, Birmingham, Ala.	47,142	18,186	65,328	106	29	-	49	7	2,019	
Mobile Co. Schools, Mobile, Ala.	44,023	31,441	75,464	92	20	9	14	8	1,524	1
San Juan School Dist., Carmichael, Calif.	51,481	134	51,615	77	-	-	27	45	2,194	
Montgomery Co. Schools, Montgomery, Ala.	22,402	16,691	39,093	54	20	-	4	8	823	
Fresno City School Dist., Fresno, Calif.	40,748	5,251	45,999	74	1	2	8	22	2,309	
Garden Grove School Dist., Garden Grove, Calif.	47,147	83	47,230	70	-	-	40	28	1,956	
Long Beach School Dist., Long Beach, Calif.	61,454	5,489	66,943	78	-	-	19	27	2,934	
San Francisco School Dist., Calif.	40,824	25,923	66,747	154	3	3	2	5	4,223	
Los Angeles School Dist., Calif.	350,909	147,738	498,647	591	19	46	91	203	21,376	3
Mt. Diablo Unified Schools, Concord, Calif.	45,645	369	46,014	56	-	-	21	26	2,122	
Oakland Unified Schools, Oakland, Calif.	19,835	35,386	55,221	88	3	9	-	-	2,227	
Richmond Unified, Richmond, Calif.	28,860	10,424	39,284	63	1	1	6	7	1,676	
Sacramento City Unified, Calif.	34,763	7,324	42,087	77	-	-	-	3	1,925	
San Diego Schools, Calif.	98,163	15,004	113,167	153	-	1	24	46	5,381	
School Dist. No. 1, City & Co. of Denver, Colo.	63,398	13,639	77,037	116	-	3	16	35	4,166	
Jefferson Co. Schools, Lakewood, Colo.	58,909	60	58,969	111	-	-	78	30	2,594	
District of Columbia Public Schools	8,280	139,006	147,286	188	55	59	-	-	1,645	6
Dade Co. Public Schools, Miami, Fla.	135,598	56,518	192,116	215	29	13	58	35	8,037	2
Orange Co. Board, Orlando, Fla.	63,034	13,055	76,089	96	17	-	25	19	2,630	
Hillsborough Co. Schools, Tampa, Fla.	74,573	19,212	93,785	131	21	2	38	15	3,260	
Palm Beach Co. Board, West Palm Beach, Fla.	42,972	17,158	60,130	91	21	-	11	18	2,549	
Brevard Co. Board, Titusville, Fla.	55,811	6,327	62,138	67	2	-	8	11	2,617	
Pinellas Co. Board, Clearwater, Fla.	65,296	12,715	78,011	109	5	6	44	11	3,311	
Duval Co. Board, Jacksonville, Fla.	87,999	34,638	122,637	135	24	4	26	18	4,100	1,
Broward Co. Board, Fort Lauderdale, Fla.	77,487	24,516	102,003	107	20	3	31	15	3,808	
Escambia Co. Board, Pensacola, Fla.	33,729	12,924	46,653	76	18	-	12	9	1,603	
Polk Co. Schools, Bartow, Fla.	40,371	11,652	52,023	94	19	-	19	6	1,990	
Dekalb Co. Schools, Decatur, Ga.	73,695	4,124	77,819	102	3	-	42	25	3,229	
Gary Community Schools, Gary, Ind.	14,063	29,826	43,889	45	13	8	2	2	973	1,
Unified School Dist. No. 259, Wichita, Kan.	58,060	8,913	66,973	116	-	2	42	13	3,173	
New Orleans Public Schools, La.	34,673	74,378	109,051	131	45	16	8	3	2,260	2,
Atlanta Public Schools, Ga.	42,506	68,662	111,168	160	63	9	20	9	2,354	2,
Muscogee Co. Schools, Columbus, Ga.	29,571	12,517	42,088	67	13	3	20	9	1,317	
Chatham Co. Schools, Savannah, Ga.	24,967	17,449	42,416	63	24	2	3	6	1,076	
Cleveland, Ohio, Cuyahoga Co.	66,324	87,241	153,565	180	23	34	35	23	4,184	2,
Cincinnati, Ohio, Hamilton Co.	49,231	37,275	86,506	106	8	5	11	16	2,990	
Toledo, Ohio, Lucas Co.	43,658	16,473	60,131	76	2	1	18	10	2,275	
Akron, Ohio, Summit Co.	43,341	15,137	58,478	71	1	1	11	12	2,304	
Columbus, Ohio, Franklin Co.	81,655	28,729	110,384	168	2	4	38	33	4,124	
Dayton, Ohio, Montgomery Co.	36,582	22,790	59,372	69	4	10	13	8	1,963	
Tacoma, Wash., Pierce Co.	32,646	3,535	36,181	66	-	-	3	4	1,839	
Seattle, Wash., King Co.	77,293	10,376	87,669	130	-	-	10	15	4,131	

d Professional Instructional Staff
hool Districts, Continued

Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
STUDENTS					PROFESSIONAL INSTRUCTIONAL STAFF						
Total Schools in District	No. of Schools in Which No White Students are Enrolled	No. of Schools Having Less Than 1% White Enrollment	No. of Schools in Which No Negro Students are Enrolled	No. of Schools Having Less Than 1% Negro Enrollment	White	Negro	Total White and Negro	No. of Schools Having No White Instructional Staff Members	No. of Schools Having Less Than 20% White Instructional Staff Members	No. of Schools Having No Negro Instructional Staff Members	No. of Schools Having Less Than 20% Negro Instructional Staff Members
106	29	-	49	7	2,019	666	2,685	14	11	24	56
92	20	9	14	8	1,524	1,091	2,615	6	25	1	51
77	-	-	27	45	2,194	8	2,202	-	-	69	8
54	20	-	4	8	823	566	1,389	-	10	1	29
74	1	2	8	22	2,309	37	2,346	-	-	54	19
70	-	-	40	28	1,956	9	1,965	-	-	61	9
78	-	-	19	27	2,934	100	3,034	-	-	40	35
154	3	3	2	5	4,223	381	4,604	-	1	39	94
591	19	46	91	203	21,376	1,935	25,311	1	6	228	233
56	-	-	21	26	2,122	9	2,131	-	-	48	8
88	3	9	-	-	2,227	661	2,888	-	-	4	48
63	1	1	6	7	1,676	198	1,874	-	-	19	34
77	-	-	-	3	1,925	106	2,031	-	-	22	48
153	-	1	24	46	5,381	229	5,610	-	-	82	66
116	-	3	16	35	4,166	338	4,504	-	-	32	69
111	-	-	28	30	2,594	7	2,601	-	-	105	7
188	55	59	-	-	1,645	6,038	7,683	25	83	1	1
215	29	13	58	35	8,037	2,016	10,053	1	21	27	137
96	17	-	25	19	2,630	578	3,208	5	11	13	60
131	21	2	38	15	3,260	694	3,954	8	13	71	34
91	21	-	11	18	2,549	776	3,325	1	5	4	50
67	2	-	8	11	2,617	213	2,830	-	-	5	56
109	5	6	44	11	3,311	481	3,792	-	6	9	85
135	24	4	26	18	4,100	1,551	5,651	16	4	71	29
107	20	3	31	15	3,808	957	4,765	3	19	39	43
76	18	-	12	9	1,603	426	2,029	11	2	13	42
94	19	-	19	6	1,990	487	2,477	4	14	25	47
102	3	-	42	25	3,229	234	3,463	-	2	11	85
45	13	8	2	2	973	1,287	2,260	5	13	1	10
116	-	2	42	13	3,173	197	3,370	-	-	43	65
131	45	16	8	3	2,260	2,560	4,820	36	43	31	35
160	63	9	20	9	2,354	2,834	5,188	6	58	8	64
67	13	3	20	9	1,317	497	1,814	-	16	5	39
63	24	2	3	6	1,076	675	1,751	13	12	5	26
180	23	34	35	23	4,184	2,505	6,689	2	13	36	44
106	8	5	11	16	2,990	867	3,857	1	-	7	60
76	2	1	18	10	2,275	452	2,727	-	-	27	32
71	1	1	11	12	2,304	187	2,491	-	-	16	48
168	2	4	38	33	4,124	594	4,718	-	2	49	80
69	4	10	13	8	1,963	776	2,739	1	9	11	33
66	-	-	3	4	1,839	51	1,890	1	-	36	26
130	-	-	10	15	4,131	201	4,332	-	-	69	54

Analysis of Student Enrollment and Professional Instructional Staff of One Hundred Largest School Districts, Continued

District	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Colur
	STUDENTS								
	Enrollment								
	White	Negro	Total White and Negro Enrollment	Total Schools in District	No. of Schools in Which No White Students are Enrolled	No. of Schools Having Less Than 1% White Enrollment	No. of Schools in Which No Negro Students are Enrolled	No. of Schools Having Less Than 1% Negro Enrollment	Wh
Buffalo, N. Y., Erie Co.	43,942	26,381	70,323	101		12	3	2	3
Rochester, N. Y., Monroe Co.	32,016	13,679	45,695	59					2
New York City Public Schools, N. Y., N. Y.	467,365	334,841	802,206	853	59	74	20	25	55
Houston Indep. Schools, Houston, Texas	131,099	81,966	213,065	225	48	14	49	29	7
San Antonio Indep. Schools, Texas	21,310	11,637	32,947	102	14	3	23	22	2
Granite School Dist., Salt Lake, Utah	60,276	59	60,335	67			22	24	2
Fairfax Co. Schools, Fairfax, Va.	117,906	3,322	121,228	152			40	28	5
Norfolk City Schools, Norfolk, Va.	31,824	23,499	55,323	74	21	3	9	4	1
Richmond City Schools, Richmond, Va.	13,542	29,441	42,983	66	30	2	1	3	
Kanawha Co. Schools, Charleston, W. Va.	52,471	3,548	56,019	144			66	112	2
Milwaukee Public Schools, Milwaukee, Wis.	95,089	31,130	126,219	157	3	5	37	30	4
Caddo Parish School Dist., Shreveport, La.	33,909	26,429	60,338	76	26	1	14	13	1
Jefferson Parish School Board, Gretna, La.	46,673	12,812	59,485	71	14		23	7	2
School Dist. of Philadelphia, Pa.	109,512	166,083	275,595	228	9	3	7	17	9
Flint City School Dist., Flint, Mich.	28,645	17,212	45,857	55		1	6	6	1
Jackson Mun. Separate Schools, Jackson, Miss.	20,793	17,919	38,712	59	19		42		
	6,702,430	1,281,418	2,483,848	12,497	1,400	215	5,218	1,786	140

This schedule is subject to comments contained in the accompanying letter of transmittal

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d Professional Instructional Staff
hool Districts, Continued

Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
STUDENTS					PROFESSIONAL INSTRUCTIONAL STAFF						
Total Schools in District	No. of Schools in Which No White Students are Enrolled	No. of Schools Having Less Than 1% White Enrollment	No. of Schools in Which No Negro Students are Enrolled	No. of Schools Having Less Than 1% Negro Enrollment	White	Negro	Total White and Negro	No. of Schools Having No White Instructional Staff Members	No. of Schools Having Less Than 20% White Instructional Staff Members	No. of Schools Having No Negro Instructional Staff Members	No. of Schools Having Less Than 20% Negro Instructional Staff Members
101	-	12	1	-	1,439	372	1,811	-	-	21	61
59	-	-	-	-	2,276	165	2,441	-	-	21	29
854	49	34	20	25	55,063	5,002	60,065	-	1	221	533
225	58	43	4	29	1,005	1,285	10,290	8	47	1	154
102	14	9	23	27	2,538	412	2,950	1	2	49	34
67	1	-	2	24	2,534	-	2,534	-	-	67	-
152	6	-	40	28	5,917	124	6,041	-	-	78	71
74	21	4	4	4	1,796	913	2,709	1	18	2	42
88	30	2	1	1	902	1,277	2,179	19	13	4	20
144	-	-	88	11	2,349	152	2,501	1	-	76	58
157	-	5	17	10	4,799	671	5,470	1	1	68	53
70	20	1	14	13	1,543	1,186	2,699	8	19	5	41
41	14	-	23	7	2,080	470	2,550	12	1	19	18
218	9	34	7	1	9,181	4,974	14,255	-	2	3	83
55	-	1	8	8	1,740	450	2,190	-	-	4	28
70	19	-	17	-	936	963	1,599	11	8	31	6
16,422	4,838	233	6,618	1,188	410,337	27,477	437,829	448	882	1,789	5,290

Omitted

EXHIBIT B

PORTIONS OF TESTIMONY IN THE UNITED STATES OF AMERICA v. HINDS COUNTY SCHOOL BOARD

[83] BY MR. SATTERFIELD: May I further inquire of counsel for the Individual Plaintiffs, by the filing of this objection as entitled, as I understand, it is intended at least to be applicable to all cases in which they are individual plaintiffs. Does counsel file this objection recognizing that the motion made by the Department of Justice on behalf of the Secretary and of the United States, does apply to those seven cases with a possibility of the addition of two more?

[84] BY MR. AMAKER: Well, we recognize that, yes.

BY THE COURT: Very well, is the rule invoked? Is there any desire that the rule be invoked? All right. The rule will not be invoked.

Now, Mr. Leonard, do you want to make an opening statement?

BY MR. LEONARD: May it please the Court, Judge Russell and Judge Nixon, I think it appropriate for me to take just a few minutes and I will attempt to be brief, in order to help the Court to understand more clearly what the position of the Government is here and I think a bit of a review with respect to these cases might be helpful for all of us in order to set the framework in which the witnesses that we intend to call are going to testify.

We are here, if I understand correctly, attempting to make a record on which this court is going to make a recommendation to the Fifth Circuit and I think it is important to try to keep possibly that in mind as these witnesses are adduced and examined and their testimony put on the record.

These thirty-three districts—I hope I have the number right and I realize that we are not in all of these cases, but I think again the record ought to reflect that we have addressed [85] our attention to the total group as the order of the Fifth Circuit applied to all of the cases—had been operating under freedom of choice plans under the Jefferson Decree until the Green case was decided in May of 1968. Subsequent to that, either the Government or the private Plaintiffs or both sought orders of this court to require the Boards to disestablish more affirmatively and move more affirmatively from their dual systems to a unitary system, and I think it is fair to say that by enlarge these Boards are not complying with the Court in attempting to move from a dual to a unitary system to that in July the Government found itself in a position before the Court of Appeals where it suggested after consultation with appropriate officials with the Department of H.E.W. and with some precident, the precident being in a bank of cases that were pending in the Courts in South Carolina, and in some other cases, to bring the office of Education and the professional educators in that office in as aids to the Court, as aids to the districts in order to attempt to get some movement from dual to unitary systems and to aid the school boards in attempting to draw plans that would in fact disestablish these dual school systems. I think it is also safe to say that most of the school boards did cooperate in that at least information was provided and the educators were received by the collegues in the districts and were able to draw and pull together the information necessary to provide some kind of a plan.

[86] I think, however, that it became obvious to the Secretary of Health, Education and Welfare that as the time pressure was building here both with respect to the field work that needed to be done, the investigation by his people, out in the field, in the districts, that it soon became

apparent to him that in order to have, in fact, an orderly movement from a dual to a unitary system, in order the accomplish in fact what we believe the Supreme Court seeks, that is a plan that works, one that is going to accomplish the objectives, both with respect to the development of the plans and with respect to the implementation of those plans, that the time was simply too short.

Now, I would be less than candid if I didn't say that the Government was somewhat embarrassed by this because we gave the Fifth Circuit some assurance that there was time but we are lawyers, not educators, and it is the educational judgment it seems to me, that's important here. These are the men who are trained to educate our children. They are the ones that have to make the administrative and the educational decisions that go with bringing about not just a unitary system but a plan for education in the framework of elemination of racial discrimination that's going to, in fact, result in quality education.

I think it is important that the Government's position with respect to the constitutional requirement be made clear. There is no question that we believe that these school boards have an [87] affirmative obligation to disestablish their dual systems and convert to unitary systems, just as soon as it is administratively and educationally feasible to do that on a sound basis and again, pursuant to a plan that is going to work, and I think that is the key to us here. We are going to try to show today that to convert to a unitary system on a sound educational basis requires some real planning, some real preparation but it also requires collaboration from the local school board officials who are public officials elected by the public and who have an affirmative obligation to uphold the law, including the mandates of the Constitution of the United States, and we would hope in this process and through the testimony that we will provide today to show that there

are some techniques, some methods that can be employed to help the administration, the faculty in these school districts to bring that process about, to provide the leadership in these communities which are necessary in order to infact get community support for what is required by the Constitution and I think it is fair to say that unfortunately in too many cases that leadership has not been provided at the local level of Government where it should be provided.

I think that the position that the Secretary of Health, Education and Welfare found himself in was one that he obviously recognized that it would be difficult for the Boards to implement the plans successfully within the time that was provided by [88] by the Fifth Circuit in its orders and that the Boards, not having seriously considered how they were going to develop a program to successfully desegregate these districts, carry this desegregation process out in an educationally sound basis, rather than to be responsible for chaos and confusion that could well result from an implementation within the time period set and obviously have detremental effects on the children and that, after all, is his and our consideration, that it was better to ask the Court to provide some additional time, and thus, that, may it please the Court, is the framework in which the Government has moved pursuant to the Secretary's letter, to seek a delay in the implementation of these plans and to give the office of education and the superintendents and the school boards involved some additional time by collaboration to see if, in fact, some agreement cannot be worked out in order to establish the end of the disestablishment of these districts. Now, it is within that framework we would like to call our witnesses. We will do our very best to try to limit their testimony to the issue at hand here and that's whether or not a delay should be recommended by this court and approved by the Fifth Circuit.

BY THE COURT: I think all counsel should direct their questions to witnesses in that same light. Let's not stray afield here today. We have a limited issue before the Court and I think all counsel [89] should keep that in mind.

BY THE COURT: Is there anything further before we begin testimony? All right, you may call your first witness.

MR. JESSIE J. JORDAN, was thereupon called as a witness and having been duly sworn, testified on his oath as follows:

Direct Examination by Mr. Leonard

Q. Mr. Jordan, would you state your full name, address and your occupation? A. Jessie J. Jordan, 782 Pine Hill Drive, Smyrna, Georgia, which is a suburb of Atlanta. At the present time I am the Senior Program Officer for Title Four in the U. S. Office of Education in the Atlanta Region, based in Atlanta, Georgia.

A. Mr. Jordan, would you briefly state for the benefit of the record, your background in education? A. I have a B.S. Degree in mathematics and Education, a Master's Degree in School Administration. Three years of teaching experience, three years as a principal. Twelve years as a school administrator, director of Transportation, Director of Program, Director of Maintenance and Operations, Assistant Superintendent, General Administration.

Q. How long have you been with the Department of Health, Education and Welfare, and more specifically, the office of Education? [90] A. I have been with the office of Education approximately two years.

Q. And during that period of time would you explain to the Court what your duties have consisted of? A. Title Four of the Civil Rights Act of 1964 is set up to lend technical assistance to school systems with problems incident

to desegregation. This takes four forms. One is the funding of University Centers and Institutes to provide in service training, institute seminar programs and other technical assistance to school systems upon their request. The second form is a grant to State Boards of Education to operate a Title Four office within each State Department of Education. Again, to render technical assistance through the expertees of the State Department upon request of the school system. Thirdly, we operate a grant program to fund grants to local education—boards of education to deal with probrams incident to desegregation, and then we maintain a professional staff in Atlanta to render technical assistance upon request of the school system.

Q. During the period of time that—prior to your coming with the office of education did you have any experiences revolving around the problem of desegregation of the local school system? A. Before coming with the office of education?

Q. Yes, sir. A. Yes, sir; the school system from which I came desegregated [91] in 1967. At that time we eliminated the dual school system.

Q. And where was that? A. That was in Cobb County Georgia.

Q. And what was the size of that system? A. Approximately 40,000 students.

Q. How many schools were there in the system? A. At that time I believe there were fifty-five.

Q. And you indicated that you were a director of transportation at one time, was that in Cobb County? A. Yes, sir.

Q. What was briefly, the extent of their transportation system? A. At that time Cobb County operated approximately 145 to 150 busses transporting about 28,000 students.

Q. During the two years that you have been with the Office of Education, have you been involved with the

problems of desegregation of local school districts? A. Yes.

Q. Would you give us some of the background, some of the states and areas that you have been involved with? A. We operate in a six state area, South Carolina, Georgia, Alabama, Mississippi, Florida and Tennessee. We have had input into a number of desegregation plans at Boards' request in South Carolina, Georgia, Florida and Tennessee. In court-order cases we have worked with some twenty-six in South Carolina, [92] approximately fifteen in Georgia, ten or twelve in Alabama, and approximately forty-five in Mississippi.

Q. You have had occasion, have you not, to testify in Court with respect to the desegregation processing plans from time to time? A. Yes, sir.

Q. With respect to your position with the Office of Education, could you tell us how your duties there relate to the desegregation process specifically? In other words, what do you do with respect to it? A. The framework in which we usually work is when a superintendent or a board, or a superintendent through his board contacts us or the University and asks for assistance in developing a plan, which this is done we go into the school system and work with them to try to develop a plan. We also work with them in other areas, of course, in service training and things of this nature.

Q. And in this process do you become personally familiar with the desegregation plans that are involved? A. Yes.

Q. And the details of the districts? A. Yes, sir.

Q. Can you tell the Court when you first became involved with the cases that are involved in this lawsuit? A. My first involvement in the present court-order in [93] Mississippi was on July 15th.

Q. And what occurred on that date? A. On July 15th, there was a meeting in Mobile, Alabama in which

various Title Four people in our office and other Title Four offices within the country were pulled together to discuss and plan the work ordered by the Court in these particular court-order cases.

Q What occurred from that meeting? A From that meeting there were ten teams formed to contact the school systems. These teams made their first trip into Mississippi beginning the 16th and 17th of July, lasting through the 22nd and 23rd of July. Then these teams returned to Atlanta on the 23rd and worked on putting recommendations together.

Q Let me interrupt Mr. Jordan for just a minute. During this first field trip generally tell the Court what the teams did. A On the first field trip the teams gathered statistical information on enrollment, certain building information, pupil locator maps where available, school location maps, visitation of schools and tried to get a general feeling and input from the school system.

Q. And then you were going to say they returned to Atlanta. What did they do with this information? A They came to Atlanta and worked with this information [94] trying to put together some tentative recommendations for the school system. Then a second trip was made into Mississippi.

Q Can you tell us about when that second visitation occurred? A Yes, sir, that was begun on July 29th through August 1st. At this trip the teams met with the school systems the second time to present some of their recommendations and to try to get input from the school system.

Q Then what happened? A They then returned to Atlanta during the period of August 2nd to August 6th, they formalized the plans that they were working on to recommend to the Board. After they had been formalized, duplicated and so forth, a third trip was made into Missis-

... from the 7th through the 9th at which time the plans were formally presented to the superintendent or the board or whoever the superintendent wished present, and then on August 11th they were filed with the Court.

Q. Tell me, at what point in this process did you personally become involved? A. I did not make any trips into Mississippi. I was coordinating the over all effort of those field coordinators and so forth and reviewing with the teams a member of a review team of the plans as they were put together.

Q. And what did your personal involvement in that review process consist of? [365] A. The team that developed the plan presented the plans to us and we had critical questions about the plans.

Q. But that team was that the team members themselves? A. Yes.

Q. Did the review members have any input in the plan development itself? A. The committee did not actually develop the plans they did examine the plans and they accepted the plans.

Q. The review members then was more or less an advisory committee to iron out any problems that needed to be corrected? A. That is correct.

Q. Incidentally Mr. Jordan, do you have an opinion as to whether or not an unitary school system is superior education as to the dual system? Q. Yes I think the unitary system is far superior to the dual system.

Q. Could you tell us what educational grounds you base that opinion on? A. To learn to live in this society I think it important to students to be trained in a desegregated setting so that they learn of the culture of the other. If they are going to live in adult life together, then they should be trained together. Statistics and research has shown the advantage to students that do better work in a desegregated setting than they do in a segregated setting.

Q Mr. Jordan, earlier in your testimony when you were discussing the second visitation that was made by the teams to the school districts involved here, you mentioned that they attempted to get in put from the district, from the board and the personnel. Could you amplify that a little bit? What do you mean by in put? A Well, what we actually tried to do, I believe was for the Superintendent and members of the Administrative Staff to give the team any idea they had to give the team any ideas they might have that should be incorporated into a desegregated plan or any ideas they had for a desegregation plan.

Q Mr. Jordan, have you had in your experience situations where by doing the preparation process that you testified to, that the school administrators and the faculty and the boards are in the position to provide some community leadership in order to smooth out the desegregation problems? A Yes sir, of course the educational leadership in any [199] school system is the Superintendents, Principals, Supervisors, and teachers. This is the only group that can represent the educational leadership, and if they are adequately trained and prepared, they can, indeed, be an educational leader within a group to insure a smoother, more acceptable movement from a dual to a unitary school system.

Q Mr. Jordan, the motion filed by the government would envision that your office would need to work with the school districts in developing this preparation program you testified to. Do you believe the capacity of your office can handle such a program? A We have the facilities of the University of the Title Four Center and we have the facilities of the Atlanta Office. We also would have the assistance of the State Department, the Title Four office in the State Department of Education. I think there would be ample personnel, but I can not guarantee you there would be enough dollars.

Q But it is your opinion that if the dollar resources are available, the personnel would be available to carry this out? A That is correct.

Q Can you give the Court a specific example of where the in-service program, the preparation program that you testified to was used in a desegregation plan? A Yes, sir. Twiggs County, Georgia T W I G G S Twiggs County began a preparation program a year ago by attending work shops we provided at the University of Georgia. I believe almost their entire faculty attended a three week [1001] session at the University of Georgia on desegregation planning and the problems involved in it. Then, the work shop continued during the school year that has just ended, throughout the school year. Throughout that period of time a desegregation plan was designed. The plan was a two-step plan involving movement in 69 and completed the job in 1970. The plan was not under court order. The plan was adopted by the Twiggs County Board of Education and will begin implementation in 1969. Twiggs County is a majority district of about seventy per-cent black.

Q Have you had opportunity to see some of the results specifically of that program? A The University people tell me that where they have held this workshop they have seen remarkable change and attitude among teachers.

Q Do you feel in your opinion as an educator, Mr. Jordan, that the attitude of the faculty and the administration of the school district has an impact on the end results itself? A Yes, sir.

Q And of the students? A Yes, definitely on the students.

Q And is it your opinion that this leads to a greater acceptance of movement from a dual to a unitary school

system? A This is correct, this is what we consider proper planning.

Q I have no further questions.

BY MR. CANNADA: We have no questions, if the Court please.

BY THE COURT: [101] All right.

* * *

EXHIBIT C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 28030 and 28042

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

HINDS COUNTY SCHOOL BOARD, et al.,
Defendants-Appellees.

(And Consolidated Cases)

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION IN THE COURT OF APPEALS

The United States moves this Court for an order amending its order of July 3, 1969 and subsequent amendments thereto in accordance with the proposed amendment order attached hereto.

This motion is based upon the following considerations:

By letter dated August 12, 1969 (a copy of which is attached) to Honorable William Harold Cox, Chief Judge, United States District Court for the Southern District of Mississippi, Secretary Robert H. Finch of the Department of Health, Education and Welfare requested to be per-

of the Office of Education may go into each district and develop meaningful studies in depth and recommend terminal plans to be submitted to the Court not later than December 1, 1969.

Sincerely

Secretary

ROBERT H. FINCH

cc: Hon. Dan M. Russell, Jr.
Hon. Walter L. Nixon, Jr.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 28039 and 28042

UNITED STATES OF AMERICA,
Plaintiff-Appellant

HINDS COUNTY SCHOOL BOARD, et al
Defendants-Appellees

(And Consolidated Cases)

Appeals from the United States District Court for the Southern District of Mississippi

Amended Order

The Court shall approve such plan unless within 15 days after submission to the Court any party files any objection or proposed amendment thereto alleging that the plan, or any part thereof does not conform to Constitutional standards.

5. If no agreement is reached, the Office of Education shall present its proposal for a plan for the school district to the District Court on or before December 1, 1969. The parties shall have 15 days from the date such a proposed plan is filed with the District Court to file objections or suggested amendments thereto. The District Court shall hold a hearing on the proposed plan and any objections and suggested amendments thereto, and shall promptly approve a plan which shall conform to Constitutional standards. The District Court shall enter Findings of Fact and Conclusions of Law regarding the efficacy of any plan which is approved or ordered to disestablish the dual school system in question. Jurisdiction shall be retained until it is clear that disestablishment has been achieved.

*

.....

August , 1969.

EXHIBIT D

Caption of Cover Page Not Included Here

MOTION BY THE DEFENDANTS IN THE ABOVE STYLED CONSOLIDATED CASES JOINING IN THE MOTION THEREIN FILED BY THE ATTORNEY GENERAL OF THE UNITED STATES IN BEHALF OF SECRETARY ROBERT H. FINCH OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE AND THE UNITED STATES OF AMERICA

Now come all of the defendants in the above styled consolidated cases and join in the motion filed therein by

the Attorney General of the United States entitled "UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT HINDS COUNTY SCHOOL BOARD, ET AL., DEFENDANTS-APPELLEES (AND CONSOLIDATED CASES)—MOTION IN THE COURT OF APPEALS" filed in this Court on or about August 21, 1969, and show to the court the following:

1. This motion is filed in the United States Court of Appeals for the Fifth Circuit by permission of the United States District Court for the Southern District of Mississippi granted in open court and made of record therein.

2. That the said motion thus filed in this Court on or about August 21, 1969, was filed in the consolidated proceedings numbered upon the docket of this Court as "Nos. 28030 and 28042", particularly referring to the first listed case of the UNITED STATES OF AMERICA VS. HINDS COUNTY SCHOOL BOARD, ET AL. and particularly being filed not only applicable to said case but applicable to it "AND CONSOLIDATED CASES".

3. That there were appealed to this Court and assigned the above docket numbers twenty-five school desegregation cases involving a total of thirty-three school districts. That the said twenty-five consolidated cases included those listed above in which this Motion of Joinder is filed.

4. That in the opinion and mandate of the Court of Appeals dated July 3, 1969, the following findings were made:

> These are twenty-five school desegregation cases *in a consolidated appeal* from an en banc decision of the U. S. District Court for the Southern District of Mississippi. . . .
>
> The order of the District Court *in each case* is reversed and the cases are remanded to the District Court with the following direction:

1. These cases shall receive the highest priority.

2. The District Court shall forthwith request that educators from the Office of Education of the United States Department of Health, Education and Welfare collaborate *with the defendant school boards in the preparation of plans to disestablish the dual school systems in question* . . . (Emphasis ours.)

4. That the United States District Court for the Southern District of Mississippi requested the United States Department of Health, Education and Welfare to collaborate with the defendant school boards "*in each of these cases*" and to file plans of desegregation for all of the defendant school districts, including the defendants making this Motion. That on or about August 11, 1969, proposed plans of desegregation were filed by the United States Department of Health, Education and Welfare in each of the above cases.

5. That in accordance with the mandate of this Court and the direction of the said District Court each of the above defendant school districts filed proposed plans of desegregation on or about August 11, 1969, reserving, however, all of their rights existing under the order of the District Court dated May 16, 1969, the appeal therefrom to the United States Court of Appeals for the Fifth Circuit, the Petition for Rehearing en banc now pending before this Court, the right to file a petition for Writ of Certiorari with the Supreme Court of the United States and all other rights existing in them. Such plans were filed subject to such reservation.

6. On or about August 21, 1969, these defendants filed additional motions for supplemental relief, including prayer that the Court grant additional time for further collaboration between the Department of Health, Education and Welfare and the defendants with plans to be submitted

not later than December 1, 1969. The motions filed by the three school districts above named in Civil Action No. 1209(W) in the District Court, The Yazoo County Board of Education, The Yazoo City Municipal Separate School District and The Holly Bluff Line Consolidated School District alleged that within the time allowed it was "impossible to work out a plan satisfactory to either the Court, the defendants or the plaintiff". Similar allegations were made by the other defendant school districts.

7. These movants join in the motion to amend the mandate of this Court filed in behalf of the Secretary of Health, Education and Welfare and by the United States of America as the same was filed on or about August 21, 1969, joining in the allegations and prayer thereof as it was filed and joining in the motion for the amendment of the mandate as therein stated.

8. These defendants by this motion adopt any proof which may be introduced in the said District Court in support of the said Motion as it was filed on or about August 21, 1969, but do not adopt any amendment, should an amendment be requested. These defendants adopt the proof which may be presented in behalf of the Secretary of Health, Education and Welfare and the United States of America solely to the extent that such proof supports the said Motion as it was filed.

9. That said motion is proper and sufficient, but these defendants join therein because of the "OPPOSITION TO MOTION FOR PERMISSION TO WITHDRAW PLANS FILED BY THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE" which has been filed by attorneys for certain individual plaintiffs in this consolidated appeal. These defendants deny all of the allegations and conclusions set forth in such "OPPOSITION TO MOTION" to the extent that such allegations are inconsistent with this

Motion and the Motion filed herein in behalf of the Secretary of Health, Education and Welfare and by the United States of America.

WHEREFORE, these defendants join in the said Motion as filed herein on or about August 21, 1969, including the prayer for relief therein contained.

Executed under authority granted in open Court and respectfully submitted this 23rd day of August, 1969.

CALVIN R. KING, Attorney for Holmes County Board of Education, et als., Civil Action No. 2779(J) in the District Court

BRIDGEFORTH & LOVE; CAMPBELL & CAMPBELL; SATTERFIELD, SHELL, WILLIAMS & BUFORD, Attorneys for The Yazoo City Municipal Separate School District, The Yazoo County Board of Education and The Holly Bluff Line Consolidated School District, Civil Action No. 1209(W) in the District Court

HAROLD M. DAVIDSON, Attorney for Leake County School Board, et al., Civil Action No. 3382(J) in the District Court

HERMAN GLAZIER, Attorney for The Issaquena County Board of Education, et al., The Sharkey County Board of Education, et al., The Anguilla Line Consolidated School District, et al. and The Sharkey-Issaquena Line Consolidated School District, et al., Civil Action No. 1096(W) in the District Court

TALLY D. RIDDELL and ROBERT H. COVINGTON, Attorneys for The Enterprise Consolidated School District, et al., The Quitman Consolidated School District, et al., and The Clarke County Board of Education, et al., Civil Action No. 1302(E) in the District Court

By:
/s/ John C. Satterfield
John C. Satterfield, Attorney

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion by the Defendants in the above Styled Consolidated Cases Joining in the Motion Therein Filed by the Attorney General of the United States in Behalf of Secretary Robert H. Finch of the Department of Health, Education and Welfare and the United States of America were served on the plaintiffs on this 23rd day of August, 1969, by mailing copies of same, postage prepaid, to their counsel of record at the last known address as follows:

Melvyn R. Leventhal
Reuben V. Anderson
Fred L. Banks, Jr.
John A. Nichols
538-1/2 North Farish Street
Jackson, Mississippi 39202
Jack Greenberg
Jonathan Shapiro
Norman Chachkin
Suite 2030
10 Columbus Circle
New York, New York

I further certify that I have also mailed a copy of said Motion to the Department of Health, Education and Welfare of the United States addressed as follows:

Mr. J. J. Jordan, Regional Director
United States Office of Education
Room 404
50 Seventh Street, N. E.
Atlanta, Georgia 30323

/s/ John C. Satterfield
Of Counsel

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FILED
OCT 8 1969
JOHN F. DAVIS, CLERK

Nos. 632 & 713

VOLUME II

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 632

BEATRICE ALEXANDER, et als.,
Petitioners,

vs.

HOLMES COUNTY BOARD OF EDUCATION, et als.,
Respondents.

(Including Consolidated Cases)

APPENDICES TO CROSS-PETITION FOR WRIT OF CERTIORARI AND MOTION TO EXPEDITE HEARING

JUDGE A. F. SUMMER
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APPENDICES TO CROSS-PETITION FOR WRIT OF CERTIORARI AND MOTION TO EXPEDITE HEARING

APPENDIX 1

PORTIONS OF THE TRANSCRIPT IN ROY LEE HARRIS v. THE YAZOO COUNTY BOARD OF EDUCATION

[73] Q. I hand you here a copy of that and ask you if this is a certified copy of that? A. This is a resolution that was adopted by the Board of Trustees.

Q. Yes, sir, is that a true and correct copy of it? A. Yes.

BY MR. CAMPBELL: We would like to offer that in evidence on behalf of the Defendant.

BY THE COURT: Let it be entered and be marked.

(MARKED EXHIBIT D-2 IN EVIDENCE.)

BY MR. CAMPBELL: That's all.

BY MR. ANDERSON: No cross-examination, your Honor.

BY MR. CAMPBELL: I would like to call Mr. John S. Holmes.

MR. JOHN S. HOLMES, was thereupon called as a witness on behalf of the Defendants, and having been duly sworn, testified on his oath as follows:

Direct Examination by Mr. Campbell

Q. State your name to the Court, please? A. My name is John S. Holmes.

[74] Q. Where do you live, Mr. Holmes? A. Yazoo City, Mississippi.

Q. What profession do you practice? A. Attorney.

Q. How long have you lived in Yazoo City, Mr. Holmes? A. Fifty-three years, that's my age. All my life.

Q. Do you have any connection with the Board of Trustees of the Yazoo City Municipal Separate School District? A. I am president of the Board of Trustees.

Q. How long have you been a member of that Board? A. This is my tenth year.

Q. Mr. Holmes, are you active in the work of the School Board? A. I would say so, yes, sir.

Q. What type of plan of desegregation of your schools do you now have in Yazoo City? A. We have a freedom of choice plan and we are, of course, operating under a decree of this court.

Q. Could you briefly tell the court with reference to the nature of this plan that you are operating under and when it was placed in effect?

BY THE COURT: We are familiar with the plan.

BY THE WITNESS:

A. I know the court put the plan on us so we won't go into the details of the plan, but the history of the matter is [75] that in 1965 the Board of Trustees of the Yazoo City Municipal Separate School District adopted a freedom of choice plan. That was in the Summer of 1965. I think we differed from most of the school districts in the State in that we were not being sued, there were no pupils trying to transfer from one school to another, there was no H.E.W., it had not sought us out but at that time in view of the law that the Civil Rights had just been passed, and in view of the decision of this District Court with reference to the Jackson case, we felt that we could not longer operate without taking affirmative action to be in compliance with what we knew that the law of the land was. Since I had been on the Board there had been no compulsory segregation in the Yazoo City schools. To this extent any pupil who had applied to go to a school of the opposite race, we were prepared to admit, but we felt at that time we needed to take affirmative action and we did so we adopted the freedom of choice plan based on what this court had approved in other cases and then we were sought out by H.E.W., they made suggestions and in August we passed a plan that provided for desegregation of the

first four grades. Now, at the time we adopted it and at the time we published it in the paper, H.E.W. had not approved it. We were getting no Federal money and we were not being sued, but we put [76] that plan into operation voluntarily and then in October, the H.E.W. with certain amendments did approve the Plan.

Q. Mr. Holmes, did you take any action yourself during that time and have you taken any action since to secure community acceptance of the desegregation of the schools and the faculties? A. At that time we took action and we have taken action since. At the time the plan was published, we placed in the paper, and I think it is probably an exhibit to the Answer in this cause, we placed a plea from the Board of Trustees to the people of Yazoo City to accept this plan and to abide by the law. It was going to be administered on an absolutely fair basis and that we wanted that to continue in Yazoo City what there had been for years and had not been for most places, and that was a harmoneous racial relations with no protests, no incidents, no marches. The atmosphere for the plan was splendid because we had seen or tried to see that it would be.

Q. Did you personally make any efforts with reference to the people in the community? A. Since that time I have gone to untold efforts, I have discussed the plan and explained it to leaders in the community. You know you have always got certain people of a very conservative nature, you might call it radical, [77] I discussed it with them, with leaders of organizations, leaders of civic organizations, explained it to them and I think that the community is completely sold on the freedom of choice plan, the necessity for it and the fact that it must operate without interference of any kind from anybody in the community.

Q. Have you had any increase since last year of integration or admission of Negro students in your formerly White schools? A. Yes, sir, the first year that the plan was in operation, for grades one through four, as I have said, there were no pupils trying to seek a transfer from

one school to another. There was no activity by any groups for any side. I think we had splendid schools, myself, perhaps I am prejudiced, for both the Negro and the White people. The first two years of the plan there were no applicants either from Whites to go to the Negro Schools or Negroes to go to the White Schools, but when the plan came into full bloom, that is, when all the grades were opened, why we had ten Negroes who attended the White schools. One of them was sick or crippled and did not come, so we had nine and this year, sixty-eight, sixty-nine, we had seventy-seven. That is an increase of 800 percent.

Q. Now, do you know why or could you give the Court in your opinion why this freedom of choice plan is working and [78] will continue to work in Yazoo City?

BY MR. ANDERSON: We object to that, your Honor.

BY THE COURT: Overruled.

BY THE WITNESS: (continuing)

A. Well, in the first place, as I have said, we have taken untold pains to sell the people on the plan. The man in the street is familiar with the freedom of choice plan and he defends it now sort of like in the old days they used to defend compulsory segregation, and he has accepted it, he has seen that they have Negroes in the schools and that nothing bad has happened. He has seen that there are Negro teachers in the formerly White schools, there are White teachers in the formerly Negro schools, and he has accepted the plan. He has come on and has brought it on in such a way that we have combatted and kept out private schools. There is a charter there for Manchester Private School to operate, but I am fully familiar with how it is getting along and they are not able to get funds for it. They need some dramatic change, some massive integration and that's what they are waiting for, like an order of this Court zoning or pairing the schools. In addition to that, why, I think that any plan this is going to work over a long period of time, and going to [79] work with educational advantages for everybody has got to be in an atmosphere of harmony and

racial good will and acceptance and we have had that in Yazoo City and the schools and in the community and I believe personally that you are going to see next year, if we are permitted to operate under the plan, you are going to see a very great increase of integration in the schools. I know it is coming because I have talked to people of all races. We have already had an eight hundred percent increase and we are going to have much greater, and they talk about the Whites will not go to the Negro schools, but the plan has a built in assurance that Whites are going to go to Negro schools because when the White schools are filled and the Negroes have come in in large numbers and under the proximity features of the plan, the Whites must go to the Negro schools. So it is my opinion that you will get as much integration—they say, is the plan working? I consider it to be working when you get a substantial percentage of integration and I thoroughly believe that this plan is going to work in that manner, Whites in the Negro schools and Negroes in the White schools in a substantial degree, and that it is going to work in such a way that education of all the pupils will be benefited because there will be harmony and good racial relations. That is my opinion.

[80] Q. You have made and considered plans for zoning and pairing in the schools? A. We have.

Q. What would be the results of that, Mr. Holmes, if you know, if either plan were put into effect? A. We have, of course, considered zoning and pairing from the very beginning of this whole controversy, but recently, after the Green Decision, we gave special consideration to zoning and pairing. We had maps made to show what zoning would do and of course, anybody knows what pairing will do, and we found that there would be a minimum of fifty percent integration and at this time it is my belief that there would be an exodus of the Whites from the schools and that you would have total resegregation, you might call it.

Q. Have you made any efforts with reference to other educators to help the City and the School Board

in planning future benefits to the students? A. Yes, sir, we have authorized employment of Dr. Keye from the University of Mississippi, primarily to help in upgrading the faculties of the schools because we believe that the better faculties you have, the better education you have, the better your freedom of choice plan will work, but we have also hired him to help us in finding a way to get competent teachers who will go into schools of the [81] other race and let us meet the orders of this court as to faculty desegregation. And in addition to that we have hired other educators that we have authorized the hiring of educators from Ole Miss, Mississippi Southern and other schools to help us in various ways to make this freedom of choice plan work. One way that I can think of, and you can't think of everything, is by some type of remedial study courses that will bring—try to bring everybody up to the same level or as close to the same level as possible, and we are seeking help and advice on that.

Q. Mr. Holmes, under your freedom of choice plan and as it is administered in Yazoo City, tell the Court whether or not you have a non-racial unitary system or a dual system of schools? A. We have a unitary non-racial system in the Yazoo City Municipal Separate School District.

BY MR. CAMPBELL: That's all.

BY THE COURT:

Q. Are you familiar enough with this plan in the Jefferson Decree to tell me something about this provision dealing with officials not to influence choice? A. Yes, sir, I think I am.

Q. The question is, has that provision or that prohibition [82] in this plan had any effect or bearing whatever on the low statistical showing that you have? A. It has definitely slowed it down, if your Honor please and I would like to say this, that in the original plan that we adopted in 1965 before H.E.W. approved it, we didn't have that provision. That was something they made us put in the plan. I wrote letter after letter to Mrs. Cole who was handling it for H.E.W. pointing out that we might want to talk to certain qualified Negro students and certain

White students that we thought might be better suited for Negro schools for certain reasons and that we could speed up the integration and do what the Government wanted us to do if she would take it out but they insisted on having it in there and it was then embodied in the Jefferson Decree and we have been absolutely tied, hand and foot, on seeking to ourselves speed up integration in the proper way. We are still tied hand and foot on that and I think that undoubtedly what is responsible for the slowness, but in addition to that, I think that once the barrier was broken and once these people went into the schools and they have been accepted and I'll say this, if there ever was a plan that was administered in good faith, it is in Yazoo City because I was with it the whole time and there was no harassment, there was no intimidation, [83] there was nobody fired, there was no child at whom an epithet was hurled, Mr. Kelly was instructed that if anything happened in that school where any Negro child was imposed upon to come down on it hard and there has been nothing of that sort. I think now that it has been broken it will proceed and it will grow fast, but I do think just what your Honor said, that it is that provision in the plan is what slowed it.

BY THE COURT:

Q. If it were removed, you think it would make a better statistical showing? A. I certainly do.

Cross-Examination by Mr. Anderson

Q. Mr. Holmes, did I understand you to say that under the zoning or pairing plan that there would result some fifty percent of each race in the schools. A. Assuming that the Whites and the Negroes all stayed in the schools, there would be a fifty percent ratio.

Q. And this fifty percent would not be good, as I understand it? A. Oh, no, we are seeking to achieve something like that probably in the long run but as of this time I said that if, at this time, if this Court imposed a fifty percent integration on us, that there would be a complete exodus [84] of the Whites from the schools and the Government would have just what they don't want.

That's entire resegregation of the schools. We feel like we are fighting your case and you are fighting ours. But I believe under freedom of choice you are going to get the same thing in a few years and it will be accepted and will last, but if you give these private school people the chance to use this massive integration at this time, they will get the money, they will get those private schools in and the children will go into them and you will never get them back out.

Q. Suppose that under the freedom of choice plan you get fifty percent integration, what would happen then? A. If we got that under the freedom of choice plan, I think that eventually it would be accepted. I don't think so at this time because it is just like buying something on the installment plan. You get a little of it here and a little of it the next year and a little the next year. You keep out your private schools, they got no place to go and eventually it might be accepted, but at this time it would destroy the public school system as we know it in Yazoo City.

Q. That is, fifty percent under the free choice or the zoning plan would destroy your system? A. At this time.

[85] Q. In terms of years, how long would it take for your freedom of choice plan to result in quite a bit of integration? A. I don't think it is going to take long, the way I see it going in Yazoo City. I think it will be—it will almost come in what the Court says when they say compliance now, because I think it will be within the next several years.

Q. You were on the school board ten years ago? A. That's right.

Q. Your district didn't start at that time with any plan, did you? A. At what time?

Q. Around fifty-eight? A. From the time I got on the school board we have had no compulsory segregation in Yazoo City. It has been traditional segregation by custom and because of the fact that I think we have got splendid schools for both races. Each race continues to

go to their own school, but as I said before, they had made their minds up that upon proper application they were not going to deny any member of any race the right to go to any school in the district because I felt like under your decisions of Brown One and two, that compulsory segregation was out and was out forever and never coming back.

[86] BY MR. ANDERSON: No further questions, your Honor.

BY THE COURT: All right.

(WITNESS EXCUSED.)

MR. W. C. MARTIN, was thereupon called as a witness on behalf of the Defendants, having been duly sworn, testified on his oath as follows:

Direct Examination by Mr. Bridgeforth

Q. Mr. Martin, describe the geographical area of the Yazoo County School District? A. It comprises all of the area of Yazoo County outside the Yazoo City Separate School District, and the Holly Bluff Line Consolidated School District.

Q. Is this a rural school district? A. It is.

Q. What is the governing body of the Yazoo County School District? A. The Yazoo County Board of Education.

Q. What are your duties as the Superintendent of Education for Yazoo County? A. Well, I—

BY THE COURT: —I think we pretty well know that now, Counsel.

[87] BY MR. BRIDGEFORTH: (continuing direct examination of Mr. Martin)

Q. Mr. Martin, as the County Superintendent of Education, did you prepare a racial composition of students attending the schools in the Yazoo County School District? A. I did.

Q. Does this, in addition to the matters heretofore introduced in evidence contain percentages of students to total enrollment within grades? A. It does.

BY MR. BRIDGEFORTH: Your Honor, we would like to introduce this as Exhibit One to this witness's testimony?

BY THE COURT: Has opposing counsel seen this?

BY MR. ANDERSON: No objections.

BY THE COURT: All right, let it be marked.

(MARKED EXHIBIT D-3 IN EVIDENCE.)

BY MR. BRIDGEFORTH: (continuing direct examination of Mr. Martin)

Q. Now, Mr. Martin, the Yazoo County School District is presently under a Jefferson Decree dated November 7, 1967, is that correct? A. That is correct.

Q. What has been your attitude and action in regard to the [88] terms of this decree? A. We have—I have tried fully to provide by the rules and regulations of this decree.

Q. Does this apply also to the members of the Board of Education of Yazoo County? A. It does.

Q. What is the school of Yazoo County which has the largest percentage of Negro students in attendance with White students? A. The attendance center at Bentonia.

Q. Have you prepared, Mr. Martin, a comparison of the attendance of White students and Colored students in that Bentonia School? A. I have.

BY MR. BRIDGEFORTH: May it please the Court we would like to introduce this as Exhibit two to the witness's testimony.

BY MR. ANDERSON: No objections, your Honor.

BY THE COURT: Let it be entered and be marked.

(MARKED EXHIBIT D-4 IN EVIDENCE.)

[89] BY MR. BRIDGEFORTH: (continuing direct examination of Mr. Martin).

Q. Now, Mr. Martin, this school at Bentonia, is this the second year in which there has been actual integration of the schools? A. It is.

Q. How many Negro students attended school at Bentonia last year? A. Twenty-eight.

Q. And how many are attending this year? A. Eighty-four.

Q. During the school year, 1967-68, that's last year, of the 28 Negro students who enrolled there, did all of those students finish that year at the Bentonia School? A. They did.

Q. None of them withdrew? A. Correct.

Q. During that year was there any racial incident of sufficient importance to be brought to your attention as County Superintendent of education? A. None at all.

Q. Do you know of any racial incident at that school of any character during last year? A. I do not.

Q. During the year 1968-69, this current year, have there been any racial incidents at the Bentonia School? [90] A. To my knowledge none.

Q. Turning your attention to the school at Benton, or known as the Benton School, have you prepared a schedule of the racial composition of that school? A. I have.

BY MR. BRIDGEFORTH: We would like to introduce this schedule also, your Honor.

BY MR. BRIDGEFORTH: (continuing examination of Mr. Martin).

Q. Is this also the second year of integration at the Benton School? A. It is.

Q. How many students were enrolled at the Benton School during the 1967-68 School Year, last year? A. Eight.

Q. And how many are enrolled this year, Sir? A. Fifty-nine.

Q. Now, Mr. Martin, during the last year at the Benton School were there any racial incidents of any character in connection with these students? A. To my knowledge, none.

Q. If there had been any of any serious nature, it would have been called to your attention, would it not? A. It would.

Q. Did all of the students who enrolled at the Benton School last year finish the school year at that school?

[91] A. They did.

Q. Now, Mr. Martin, other than one disciplinary case involving a Negro student, has there been any racial incidents of any character at the Benton School this year? A. Not to my knowledge.

Q. And if there had been any serious incidents you would have known it, would you not? A. That's true.

Q. Mr. Martin, what is the percentage of White students attending the schools of the Yazoo County School District who are actually attending classes with Negro students? A. Eighty-nine percent.

Q. And on the other hand, what percentage of Negro students within the school district are attending classes with White students? A. I believe that is five percent.

Q. Might it be five and a half percent? A. I believe so.

Q. Are there other Negro students who may attend classes this year with White students? A. There are.

BY MR. BRIDGEFORTH: Now, your Honor, we won't go into the detail of that. It is an administrative detail within the plan that is in force and effect, but we did want to call that to the court's attention.

[92] BY THE COURT: All right. You haven't asked to have that marked yet.

BY MR. BRIDGEFORTH: I'm sorry, I would like to offer it.

BY THE COURT: All right, let it be entered and be marked.

(MARKED EXHIBIT D-5 IN EVIDENCE).

BY MR. BRIDGEFORTH: (continuing direct examination of Mr. Martin).

Q. Mr. Martin, when did the Board of Education first enter a desegregation order upon its minutes? A. In 1965.

Q. Do you know the date or the month? A. April 22nd, I believe.

Q. Was there at that time any suit pending against the local district or was this a voluntary act? A. This was a voluntary action.

Q. Later, in that year, were there negotiations with the office of Health, Education and Welfare? A. There was, yes.

Q. Was an agreement entered into with that office? A. It was.

Q. Since that agreement has been made has the Yazoo County School District been denied any Federal Funds of any character? A. They have not.

[93] Q. Under the plan agreed upon with Health, Education and Welfare, when were the first choice forms sent out to the students of the Yazoo County School District? A. In December of 1965.

Q. How many grades were covered that first year? A. Two.

Q. How many grades were covered the second year? A. Four.

Q. Was that four additional grades for a total of six? A. Four additional grades.

Q. And how many grades were covered the third year? A. Six grades.

Q. Was that the year of '67-'68? Last Year? A. It was.

Q. This is the first year that all students were included in choice of forms? A. That is correct.

Q. During that year did the Yazoo County School System experience its first actual integration of Negro students moving into the White schools by way of transfer? A. In '67-'68, that's true.

Q. Mr. Martin, do you recall at the beginning of this plan any investigation by agencies of the Federal Government to determine whether or not the plan had been adopted in good faith and was being performed in good faith? [94] A. The one incident I recall is the F.B.I. agent came by and asked for a copy of our freedom of choice form to send to his superior.

Q. Was the first integration that you described at Benton and Bentonia Schools accomplished prior to the

entry of the Jefferson Order that we are now operating under? A. It was.

Q. Now, Mr. Martin, prior to the actual accomplishment of this integration, do you recall any activities on the part of the Board to prepare the way for the actual integration of the students? A. The Board had several meetings with interested parents, P.T.A. members, citizens of the different communities advising them of the right way to do this and their obligation and their duty to obey the court's decree.

Q. Have you noticed what has been your observation as to whether or not there has been an increasing acceptance or a decreasing acceptance of integration under freedom of choice by this rural area that you serve? A. There has been an increasing acceptance as shown by the number of students.

Q. What additional activities of the Board can you point to for the Court to show their efforts along similar lines? A. Through the efforts of the Board, the Mississippi Legislature in regular session passed a law permitting the use [95] of County school busses and also classrooms by the Headstart program.

Q. And have those busses and classrooms generally been utilized in that program? A. They have.

Q. In the Yazoo County Schools? A. That's correct.

Q. Mr. Martin, at the close of the school year in May of 1968, what was the opinion of the Yazoo County School Board and your opinion, as to whether or not freedom of choice under the Jefferson Decree was working in Yazoo County? A. It was the unanimous opinion that it was working.

Q. Did you have problems at that time? A. We did.

Q. What was the problem or what were the problems? A. The main problem was faculty integration.

Q. Had the Board at that time adopted any plan to meet that difficulty? A. It did.

Q. Tell the Court what that plan was? A. The County Board of Education ordered each principal of each attendance center to make every effort to secure able qualified faculty members.

Q. Excuse me, you have already testified to the Court as to [96] what faculty members you secured of the opposite race, but what I am asking you, Sir, is what long range plan has the Board adopted to avoid those difficulties. A. Well, the Board has employed counselling teams from the University of Mississippi, headed by Dr. Keye.

Q. Can you give the Board—the Court the gist of what the proposed plan is so the Court will understand what Dr. Keye is attempting to do? A. Dr. Keye was requested to present to the Board a plan whereby teachers could be secured of above average excellence to teach in schools of the minority race.

Q. This was a situation of desegregation from the Board's point of view in May of 1968? A. Correct.

Q. Did anything happen at that time in connection with the desegregation of the—plan for the desegregation of the school? A. Well, that was the time of the Green decision.

Q. Was that decision brought to your attention? A. It definitely was.

Q. Was it brought to the attention of the Board? A. It was.

Q. Was this the month of June of 1968? A. That is correct.

Q. Following this happening, what further actions did the [97] Board take? A. The first thing, they ordered Dr. Keye to hurry up, and then they went on and secured services of this team from Mississippi Southern and they also had a meeting with Mr. Fatheree of the State Vocation Department on improving the vocational facilities in the County and they also went so far as to secure a coordinator for the program.

Q. What part did the Board visualize the vocational program would play? Could you tell the Court of your visit to a similar installation? A. We visited—I visited

the vocational complex at Rolling Fork and Sharkey County, and we secured plans and specifications and reported to the Board and the Board has surveyed them and at the present time studying them.

Q. What was the purpose of employing the team from Mississippi Southern University? A. To make a survey of the White parents in Yazoo County.

Q. Did you prepare in connection with this survey any information for Dr. Harold Knight? A. I did.

Q. Did Dr. Knight prepare and give to you a form of certain information that he desired in making this survey? A. He did.

Q. Did you submit that form to the principals of the schools under your jurisdiction? [98] A. I did.

Q. Did they prepare a list of White patrons with associated information in accordance with that request? A. Yes.

Q. This was done under your direction and control? A. That's correct.

Q. And you furnished this list and that information to Dr. Knight? A. That is right.

BY MR. BRIDGEFORTH: We would like to offer this form that was used to secure the information as an exhibit to Mr. Martin's testimony.

BY MR. ANDERSON: I object to this, your Honor, and the testimony, as being irrelevant as to whether or not their freedom of choice plan is working.

BY THE COURT: I overrule your objection. Let it be entered.

(MARKED EXHIBIT D-6 IN EVIDENCE).

BY MR. BRIDGEFORTH: (continuing direct examination of Mr. Martin).

Q. Now, Mr. Martin, in addition to the items that you have stated to the Court which were undertaken by the Board as they considered the Green decision, was there any further definite goal of teacher desegregation given to you? A. There was a plan.

[99] Q. Was there any definite numerical present goal of teacher desegregation given to you? A. It was.

Q. What was that, Sir? A. That we set a goal of one teacher of the minority race in each school for each six teachers of the majority race.

Q. Was there any further decision of the Board in connection with the employment of educational consultants to advise with them as to the operation of the freedom of choice plan? A. There was.

Q. What was this action? A. It was to employ a team from either the University of Mississippi or from Mississippi Southern to assist with this program.

Q. Now, Mr. Martin, over what period of time did these deliberations take place by the Board of Education of Yazoo County? A. About three months.

Q. State whether or not the Board adopted a resolution setting out its thought as to how best the freedom of choice plan as it was being operated could be implemented by these additional steps? A. It did.

Q. Do you have the original of that resolution?

[100] BY MR. BRIDGEFORTH: We would like to ask that the original—or a certified copy be offered in evidence, your Honor.

BY THE COURT: It may be entered and be marked.

(MARKED EXHIBIT D-7 IN EVIDENCE)

* * *

[108] MR. H. Y. SWAYZE, was thereupon called as a witness for the Defendants, and having been duly sworn, testified on his oath as follows:

Direct Examination by Mr. Bridgeforth

Q. You are Mr. H. Y. Swayze? A. That is right.

Q. Where do you live, Mr. Swayze? A. Benton, Mississippi.

Q. What is your occupation? A. I am a farmer.

Q. When did you start farming, Mr. Swayze? A. In 1929.

Q. Who did you start farming with, in association with whom? [109] A. With a partnership on a plantation owned by the former Senator John Sharp Williams and his brother who was a banker in Yazoo City, Mr. C. H. Williams.

Q. Are you still associated with the Williams family in this farming venture? A. I am.

Q. Do you also farm properties that you own yourself? A. I do.

Q. How long has the Swayze family lived in Yazoo County, Mr. Swayze? A. I think the first one came there in 1830.

Q. Does your family have broad connections throughout the County? A. It does.

Q. Does the Williams family with whom you are associated have broad connections? A. They do.

Q. Were these connections helpful to you in discharging your duty in desegregating the schools of Yazoo County? A. They were.

Q. When did you become a member of the Yazoo County School Board? A. About ten years ago.

Q. Prior to that time had you been a member of the School Board—the Attendance Center School Board at the Benton [110] School. A. I had, about five years.

Q. When did you become chairman of the Board of Education of Yazoo County? A. Four years ago, the first of this coming January.

Q. What was happening at the time you became chairman of the Board? A. We were in the process of sending out the first freedom of choice plans.

Q. Do you recall the Board deciding to desegregate the schools? A. I do.

Q. Tell the Court how you came to make that decision? A. Well, we decided to desegregate the schools and it was a hard decision, I must say. We decided because we had convinced ourselves that to follow any other course would not—we would not be law abiding citizens, and we are law abiding citizens in Yazoo County

Q. When was the order entered desegregating the schools in the County, Mr. Swayze? A. Well, it was in 1965. I don't remember the exact date. Possibly April, I believe. I am not sure.

Q. At this time, what did you do to inform the people of the District of your actions? A. Well, Sir, I realized, of course, that I couldn't go [111] anywhere without the cooperation of the people, and I decided that the only way to be assured of that cooperation was to talk to them about it and that I did. And we did, the members of the Board. We went over the County talking to individual people and we assured ourselves that we would have the cooperation of the people in Yazoo County if we proceeded with it and integrated the schools.

Q. Has the Board stood by its decision since April 22nd, 1965? A. It has.

Q. Have all freedom of choice periods been fairly administered? A. They have.

Q. When it appeared as a result of the receipt of freedom of choice forms executed by parents of Negro children for transfer to formerly White schools, what action did the Board take? A. I am sorry, I didn't hear the first of your question.

Q. When the Board first received information that Negro parents had executed freedom of choice forms indicating their desire to transfer their children to the formerly White schools, indicating that there would be, as a result of the policy of the Board, the first integration of the schools of the County, what did the Yazoo [112] County Board of Education do? A. Then we began to hold meetings among the people whom we thought were responsible people and we wanted very definitely—desperately to have on our side, and we met with the local boards of education, the local trustees and the interested people, we asked them to come to a meeting in Yazoo City and we talked to them and told them what we had to do and what we were going to do and seeking their cooperation.

Q. Did you receive their cooperation? A. We got their cooperation, I might state.

Q. Do you believe the freedom of choice plan has worked in Yazoo County to desegregate the schools? A. I do.

Q. Now, Mr. Swayze, do you recall the occasion when an order of the Court was entered after suit by the National Association for the Advancement of Colored People Legal Defense Fund, a Jefferson Decree was entered against the school board? A. Yes.

Q. Since that time have you sought to comply fully with the terms of that decree? A. I have.

Q. Now, Mr. Swayze, when were you informed of the Green decision? [113] A. I believe in 1968, wasn't it? I am not sure.

Q. That's the right year, Mr. Swayze. A. I'm sorry, but I don't recall the exact date.

Q. Do you recall being told about the Green Decision? A. Oh, yes, I was told about it in a regular meeting of the Board.

Q. Since that time has the Board considered further steps under freedom of choice plan to fully meet the guidelines that were set out in Green? A. Yes.

Q. Can you tell the Court over what period of time the Board considered these steps? A. From the time we knew about the decree until now.

Q. You saw Mr. W. C. Martin, a witness before this Court introduce a resolution of the Board which he described as a resolution setting out the thought of the Board following this period of effort to further meet the guidelines of the Green Decision. Are you familiar with that resolution? A. Yes, I am.

Q. Does it fairly express the sentiment and intent of the Board of Education of Yazoo County? A. Yes, it certainly does.

Q. Now, Mr. Swayze, is it your opinion—or what is your opinion as to whether or not the freedom of choice plan [114] as it now exists in Yazoo County and as further implemented by the resolution of the Board that we have mentioned, what is your opinion as to whether or not that is adequate to eradicate the last vestige of the former

de jure segregated school system? A. Well, I don't think there is any doubt about it, but that the freedom of choice plan which is operating and succeeding in Yazoo County, is the only system under which we can integrate the schools. I believe it will integrate the schools. It has and it will.

Q. Did your board consider in detail what would happen if the schools of the district were paired? A. Yes.

Q. Or if they were zoned? A. Yes, it did.

Q. Did the Board prepare a map of the County and place thousands of pins in it to locate each child within the County? A. It did.

Q. And determine what the results of zoning would be under this? A. Right.

Q. As a result of that study, what is your opinion should the Court enter an order requiring the school district to either zone or pair the schools of the County and present that final result to the patrons of the county schools. [115] What is your opinion as to whether or not the patrons of the County schools would patronize that school system? A. Well, sir, I think that we couldn't expect too much cooperation if the Court would order a decree now to immediately make integration on the basis of pairing or zoning. I don't think the people of Yazoo County would go along with it. I think the White people who could, I mean who were financially able, would withdraw from the schools and I think those who weren't financially able would do all they could to find another neighborhood to avoid it. I think they would do anything to avoid it. On the other hand, I think if this freedom of choice is allowed to go as it is now, I really and truely believe that we have got it whipped.

Q. Do you feel that the freedom of choice will work to finally remove the last vestiges of this dual school system? A. I very definitely do.

BY MR. BRIDGEFORTH: That's all.

BY MR. ANDERSON: No questions, Your Honor.

BY THE COURT: Mr. Swayze, in your report there—I mean, in your resolution you state the present

objective and goal set by the Board is [116] one teacher of the minority race for each six teachers of the predominant race in each County school. That's correct, isn't it? A. Yes, sir, that is correct.

Q. How long do you think it will take you to reach that goal? A. Judging from—we had a terriffic time in finding two teachers to go into the all Negro school this year. We had a terriffic time, your Honor, but we found them. Now that the ice has been broken, and I say this, we are also—I think it has been brought out here before, but I will be a little bit repetitious, if I may—we are making plans through our employing of Dr. Keye, and our efforts, we are planning to try to upgrade the teachers in Yazoo County. We are going to pay them our of Yazoo County money, so that when we hire teachers we can get the type of teacher that we can assign to a school and they will take it.

BY THE COURT: What did you say? You will be able to pay them more?

BY THE WITNESS: That is our Plan.

BY THE COURT: Are you going to have more money than you have had in the past?

BY THE WITNESS: [117] We are going to pay them with County money.

BY THE COURT: I understand that.

BY THE WITNESS: And we are trying in that direction to have a reservoir of teachers that we can have—we realize that we can't take the teachers that we have now and assign them to a school, they will just quit, but I believe if we get these teachers and we are willing to pay them more than we are paying the others, to go to these schools, I mean, to sign a contract that will let us assign them to a school, I think we will have it made.

BY THE COURT: And your are planning on paying them more money to go to these schools of the minority race?

BY THE WITNESS: Well, everybody. We realize that to upgrade our school, our teachers, it is going to be necessary to pay them more.

BY THE COURT: Would you have to pay Colored teachers more to get them to teach in White schools?

BY THE WITNESS: I don't know, but we couldn't make any distinction.

BY THE COURT: So you plan to do that whether you have to or not?

[118] BY THE WITNESS: That is right; yes, sir.

BY THE COURT: I just want to ask this. How do you plan to get the money? You have a limit, don't you, on your levy?

BY THE WITNESS: Yazoo County now is not in bad shape taxwise for schools.

BY THE COURT: Oh, I see. Well, yours is better than mine. That's what I want to know.

BY MR. BRIDGEFORTH: I can answer that question a little more specific, if you would like me to, Your Honor.

BY THE COURT: I notice in one of the cases we handled, they have had a special act of the Legislature to give them three extra mills.

BY THE WITNESS: I think if you will ask Mr. Bridgeforth, he is more familiar with that than I am and he can give it to you.

BY MR. BRIDGEFORTH: Your Honor, we have some leeway under legislation also by virtue of which we can exceed the 25 mill limit.

BY THE COURT: All right, anything further?

(WITNESS EXCUSED)

* * *

[129] MR. JACK G. WILSON, was thereupon called as a witness on behalf of the Defendants, having been duly sworn, testified on his oath as follows:

Direct Examination by Mr. Bridgeforth

Q State your name please? A Jack G. Wilson.

Q Where do you live, Mr. Wilson? A Vicksburg, Mississippi.

Q. What is your occupation, Mr. Wilson? A. I am a special agent with the Federal Bureau of Investigation.

Q. How long have you been an agent with the Federal Bureau of Investigation? A. Since 1954.

Q. Have you been the agent generally resident in Yazoo County during some period in the immediate past? A. Yes, sir, I have.

Q. Would you state to the Court what that period was, please, sir? A. From July of 1965 to approximately February of 1967.

Q. During this period of time the area under your jurisdiction would have included all of Yazoo County? A. That's correct.

Q. Including Yazoo City and the area of Holly Bluff? [130] A. Yes, sir.

Q. Now, Mr. Wilson, during this period of time, has there ever been brought to your attention any complaint in connection with the functioning of the schools, any schools within Yazoo County? A. No, sir, there has not. Not that I remember of.

Q. This question as I phrased it was limited to Yazoo County. I intended to embrace all of the County and that would be inclusive of the town of Yazoo City. Does your answer still remain the same, sir? A. Yes, sir, it does.

Q. Now, Mr. Wilson, do you recall an occasion when you were asked to make an investigation in regard to the desegregation of the schools in Yazoo County and Yazoo City and the Holly Bluff Line Consolidated School District? A. Yes, sir, I do.

Q. Would you tell the Court of that, please? First who asked the investigation? A. This investigation was requested by John Doar who was then Assistant Attorney General, Civil Rights Division, U. S. Department of Justice.

Q. How many citizens did you interview in connection with this investigation, Mr. Wilson? A. Approximately forty-six or eight.

Q. And during approximately what date was this investigation [131] made? A. Speaking of the County as a

whole, including the City, from October of 1965 through February of 1966.

Q. Did this investigation coincide with the desegregation of the schools of the County and of the City by virtue of orders entered by the different Boards, is that correct? A. Yes, sir.

Q. Would you state to the Court whether or not you were told of any intimidation or any coercion at all in connection with this investigation?

BY MR. ANDERSON: We object to that, your Honor.

BY THE COURT: Overruled.

BY MR. BRIDGEFORTH: (continuing direct examination of Mr. Wilson)

Q. You may answer the question. A. I found no evidence of any intimidation on the part of forty parents of children that I interviewed who had previously executed choice forms in regard to their schools. I found one parent who said that she had been influenced by radio and T.V. programs but she stated that she would not change her child from the school that she selected for it, which was a Negro school, because of these programs.

[132] BY MR. BRIDGEFORTH: That's all we have, your Honor.

BY MR. ANDERSON: No questions, your Honor.

BY THE COURT: All right.

* * *

EXHIBIT D-3

RACIAL COMPOSITION OF STUDENT BODY ATTENDING THE SCHOOLS OF THE YAZOO COUNTY SCHOOL DISTRICT

1. Total number of students attending the Yazoo County School District:

3,691

a. Total number of white students attending said schools:

1,068

b. Total number of Negro students attending said schools:

2,623

c. Percentage of white students to the total enrollment:*

28.9

d. Percentage of white students to total enrollment by grades:

Grade 1	23%
Grade 2	23.8%
Grade 3	26.6%
Grade 4	25.8%
Grade 5	23.4%
Grade 6	24.7%
Grade 7	30%
Grade 8	29.3%
Grade 9	30.8%
Grade 10	40%
Grade 11	38%
Grade 12	49%

*There are no other ethnic groups than white and Negro enrolled in substantial number. Any enrollees of ethnic groups other than Negro are included as white enrollees. In each instance, balance of percentage of enrollees is Negro.

EXHIBIT D-4

RACIAL COMPOSITION OF STUDENTS ATTENDING THE BENTONIA SCHOOL

1. Total number of students attending the Bentonia School:

533

a. Total number of white students attending said school:

449

b. Total number of Negro students attending said school:

84

c. Percentage of Negro students to the total enrollment:

15.8%

d. Percentage of Negro students to total enrollment by grades:

Grade 1	12%
Grade 2	22%
Grade 3	23.5%
Grade 4	10%
Grade 5	12.5%
Grade 6	21%
Grade 7	14%
Grade 8	20%
Grade 9	19%
Grade 10	15%
Grade 11	6%
Grade 12	33%

EXHIBIT D-5

RACIAL COMPOSITION OF STUDENTS ATTENDING THE BENTON SCHOOL

1. Total number of students attending the Benton School:

563

a. Total number of white students attending said school:

504

b. Total number of Negro students attending said school:

59

c. Percentage of Negro students to the total enrollment:

10.5%

d. Percentage of Negro students to total enrollment by grades:

Grade 1.	6.5%
Grade 2.	4.5%
Grade 3.	3.6%
Grade 4.	16%
Grade 5.	20%
Grade 6.	10%
Grade 7.	10%
Grade 8.	10%
Grade 9.	11%
Grade 10.	6.5%
Grade 11.	10%
Grade 12.	5%

EXHIBIT D-7

WHEREAS, the Board of Education of Yazoo County, Mississippi, finds it is desirable to formalize its position and plans for the administration of the public schools of the Yazoo County School District, including its actions to carry out its duties under the Decree of the United States District Court for the Southern District of Mississippi; and

WHEREAS, this Board is of the opinion the patrons of the schools which it administers are entitled to a clear statement of the Board's position for present information and future guidance; and

WHEREAS, the Board desires a statement of policy be available for presentation to the District Court for the Southern District of Mississippi..

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of Yazoo County, Mississippi, that the following embodies its finding of fact and its plans and intentions for the future operation and maintenance of the schools within its jurisdiction:

1. Prior to the enactment of the Civil Rights Act of 1964, with complete respect for the Court, the attitude and actions of this Board were in accordance with the actions of the governors and legislatures of the Southern states and particularly followed the exhortation of the "Southern Manifesto" (signed by members of the Southern Congressional Delegations) wherein, by all honorable means, the citizens of the South were counseled to follow the constitutional principals as recognized prior to the *Brown* decisions and to maintain their system of schools under the original "separate but equal" doctrine.

2. Following the adoption of the Civil Rights Act of 1964, and in light of the decisions which affected the pub-

lic school systems of Jackson, Mississippi, and Savannah, Georgia, the Board concluded that the honorable and lawful discharge of its duties required it recognize and apply the newly enunciated constitutional principals applicable to the public schools of the United States. The Board came to understand that, should it continue to follow the policies advocated as stated above, the members of the Board would be in violation of law and the law-abiding citizens of Yazoo County, Mississippi, would be harmed by the actions of the Board.

3. As basic policies and procedures were being formulated under the Civil Rights Act of 1964, this Board informed itself of such actions and, on the 22 day of April, 1965, voluntarily entered an order beginning the desegregation of those schools administered by it. The order was later modified during the fall of 1965 by agreement with representatives of the Office of Health, Education and Welfare. From the time voluntary agreement for the desegregation of the schools of the Yazoo County School District was approved by HEW, this district has continuously received all federal funds under the programs administered by HEW.

4. The current suit was filed by the National Association for the Advancement of Colored People's Legal Defense Fund after rendition of the *Jefferson* decree by the Court of Appeals for the Fifth Circuit. Through informal hearings, this Board cooperated for the entry of an acceptable decree in the case without delay or formal hearing. Such decree was rendered two months and ten days after the filing of this suit.

5. This Board secured passage by the Legislature of the State of Mississippi of laws permitting its facilities, buses, etc. to be lawfully leased to agencies cooperating with the Office of Economic Opportunity in order that the

"Head Start Program" could be established within the school district. Members and employees of this Board met with patrons and interested citizens to prepare the way for actual integration of the Benton and Bentonia Schools, the principal formerly white attendance centers of the district.

6. At all times this Board has conducted the affairs of the schools within its jurisdiction in accordance with the decree of this Court entered on November 8, 1967. Following the March, 1968, choice period, the Board was of the opinion it was operating its schools within the law and was of the opinion the Board needed only to supervise peaceful and constructive acceptance of indicated racial transfers and accomplish faculty desegregation. However, when new requirements were announced by the Supreme Court in May, 1968, it became necessary for the Board to re-study its duty in the light of the newly enunciated guidelines. As a result of this study the Board finds as follows:

a. Within the district the student bodies of the public schools consist of approximately 72% Negro children and 28% white children. Because of the relative affluence of the white parents of the district and the relatively small number of white (especially in the elementary grades), a plan of pairing schools or geographical attendance zones, producing massive initial desegregation, will result in the withdrawal of the white children from the public school system. Almost complete segregation would result. This would prevent continued desegregation of the student bodies which is now proceeding in an orderly fashion.

b. The Board further finds that, although the freedom of choice plan has not resulted in the transfer of any white students to the formerly Negro schools called Linwood, King and Gibbs, continued use of the freedom of choice plan, in connection with the additional steps hereafter set

out, presents the most practical plan for finally eradicating the last vestiges of the former system of dejure segregated schools;

In order to carry out the letter and spirit of *Green* and companion cases the Board has determined to take the following steps:

(a) To continue the true freedom of choice plan which has been in effect under the existing *Jefferson* decree,

(b) To increase teacher desegregation through the use of an incentive plan now being formulated in consultation with Dr. Richard E. Keye of the University of Mississippi faculty (which plan includes increased salary schedules supported by local taxation for teachers meeting certain standards of excellence and a condition of employment that the teachers agree to accept assignment to schools predominantly attended by members of a different race). The present objective and goal set by the Board is one teacher of the minority race for each six teachers of the predominant race in each school.

(c) To set up a full program of vocational education which in the past has been neglected within the schools and to utilize the program as an effective course of training within the district. The placement of vocational training facilities will be designed to alleviate the problem of all Negro student bodies and to assist in the overall desegregation of the schools.

(d) To obtain counsel and advise of qualified educational consultants for implementing desegregation under the freedom of choice plan to the end that each student attending any attendance center within the jurisdiction of the Board enjoy completely equal educational opportunity.

CERTIFICATE

I, W. C. Martin, Secretary of the Board of Education of Yazoo County, Mississippi, do hereby certify the foregoing is a true and correct copy of a resolution adopted by said Board at its regular October 3, 1968 meeting.

Executed this 8th day of October, 1968.

/s/ W. C. Martin
W. C. Martin

(Seal)

APPENDIX 2

PORTIONS OF THE TRANSCRIPT IN CHARLES HOLLINGSWORTH v. THE ENTERPRISE CONSOLIDATED SCHOOL DISTRICT AND QUITMAN CONSOLIDATED SCHOOL DISTRICT

[1] BE IT REMEMBERED, to-wit: that the following proceedings came on to be heard in the United States District Court for the Southern District of Mississippi on December 3, 1968 at Jackson, Mississippi, before the HONORABLE WILLIAM HAROLD COX, United States District Judge, HONORABLE DAN M. RUSSELL, JR., United States District Judge, and HONORABLE WALTER L. NIXON, JR., United States District Judge for the Southern District of Mississippi.

[2] (Clerk calls case)

BY JUDGE RUSSELL: What says the Plaintiff?

BY MR ANDERSON: Plaintiffs are ready, Your Honor.

BY JUDGE RUSSELL: Is the Government in this case?

BY MR ANDERSON: No, Your Honor.

BY JUDGE RUSSELL: All right, what says the Defendants?

BY MR RIDDELL: I think I should make this explanation to the Court Your Honor I represent the Quit-

Q. Are federal funds part of the funds involved in the program of building that is now being completed at Enterprise school? A. Yes.

Q. How many negro children are not at Enterprise High School? A. I believe we have 96 black children at the Enterprise High School; we have 264 black children at the Central High School for a total of 360.

Q. How many white children are now served by the Enterprise Consolidated School District? A. 414.

Q. Does Enterprise Consolidated School District have any other attendance centers? A. It does not.

Q. Upon what statistics you have just mentioned based? A. Initial enrollment of the present 1968-69 school year.

Q. Do you anticipate the enrollment of any more black students this year? [86] A. I think so. We have 27% of the negro students now attending our black people are rather slow and reluctant to enroll and I am satisfied that we will reach 30% of the grade level.

Q. You've indicated that the ratio of black to white is 60% white and 40% blacks. What is the ratio of blacks attending school in Enterprise Consolidated School District? A. The student ratio differs from the overall ratio. The student ratio is 55% white to 45% black, as the colored families tend to have more children per family than do the white.

Q. You've indicated that 27% of black students in the district attend school with whites, is the district what is the percentage of all students in the Enterprise Consolidated School District that are attending school racially mixed? A. We have 63% of the students within the Enterprise Consolidated District attending racially mixed situation.

Q. How long have the students in the Enterprise School District been free to attend the school of their choice? A. I would say since the district's organization in 1967.

Q. Why is that? [87] A. Well we have never had a policy of racial segregation in the district since its or-

organization and to my knowledge no student has ev
been denied admission to any of the schools in the distri
Also the Enterprise School District ranks enrollment wi
among the smallest in the state and we take studen
wherever we can get them.

Q What is the policy of the district for transferrin
students in and out of the district? A We believ
that people have the right to make their choice and there
fore in keeping with this beliefe we have the policy of fre
transfer, and children are accepted from the surroundin
areas.

Q I believe that we can stipulate if Counsel wi
certain facts of record that needs to be brought to ou
memory. I submit them to Counsel in interest of time
that the patrons filed a petition with the district on March
9, 1965 calling our attention to the ruling in the Brown
case, that we adopted a voluntary plan on May 1st, 1965
after receiving the guideline acts of the Civil Rights Act
on May 1, 1965, that this complaint was filed on May 21st
1965, that a preliminary injunction was issued from this
case on June 3, 1965, which required among other things
the submission a plan of desegregation by June 15, 1965
[fol. 888] and required admission of children to schools on a
racially non-discriminatory basis with all deliberate speed
as required by the U. S. Supreme Court and required under
Brown vs. U. S. Board of Education of Topeka, that the
district adopted a plan in response to that injunction on
July 1, 1965 which was filed on July 15, 1965 and provided
for initially two grades the first year, two grades the sec
ond year, two additional the three years and three grades,
known as a two, two, two three, three plan of segrega
tion. That that plan was objected to by the Plaintiff and
on July 22, 1965 that the district was then required to
file a plan that is in compliance with a new ruling being
by the Singleton case. That the district pursuant to an
order of July of 1965, adopted further revised plan on
July 27, 1965, providing for the integration of grades 1,
2, 3 and 12 beginning in September of 1965. This plan was
approved by the Court on August 3, 1965, with the under
standing that an amendment would be made with refer

are on a rise again, these people are coming back which shows that their attitude has changed.

[96] Q. We have no further questions.

BY JUDGE RUSSELL: All right, anything further from the Plaintiffs?

BY MR. ANDERSON: We have nothing further, Your Honor.

BY JUDGE NIXON: What is it that your clients desire that is not being done by this school district?

BY MR. ANDERSON: Quite a bit, Your Honor, for a number of things we still have in this district one black school.

BY JUDGE NIXON: Isn't that by choice rather than by compulsion, or do you have any evidence to the contrary to offer?

BY MR. ANDERSON: I don't think that's the point, at least I don't think it is. Although they do have the freedom of choice to select the white schools. I do think that another plan would make this easier and would make these schools system a one school system rather than having a negro in an all white school.

BY JUDGE NIXON: You mean you don't think that an effort has been made to make this Enterprise Consolidated School System a unified school system? In all candor and honesty?

[97] BY MR. ANDERSON: Yes Your Honor, I think there has been quite a bit of progress made in quite a few of the districts in the past three years, but if you go back and look at it from 1954 Your Honor we have made no progress within that time limit.

BY JUDGE NIXON: Are you asking that the Brown decision be implemented or that the Jefferson Decree be?

BY MR. ANDERSON: No, I was just speaking of progress, Your Honor, if we are allowed to proceed in a number of districts, not necessarily this district, just piecemill of what the defendant's request is to continue with freedom of choice because it would allow us less desegregation and that's the main reason that I feel that a number

of these want to maintain the freedom of choice in order to detain the low amount of desegregation in these districts.

BY JUDGE NIXON: All right.

BY JUDGE RUSSELL: Both sides rests?

BY MR. ANDERSON: Yes, Your Honor.

[98] BY JUDGE RUSSELL: What says the defendants?

BY MR. COVINGTON: We rest, Your Honor.

BY JUDGE RUSSELL: All right, let the record show that both sides rests.

BY JUDGE COX: I want to congratulate Counsel for both sides in this case for staying on the issues.

BY MR. COVINGTON: Thank you, Your Honor.

BY JUDGE COX: It was real refreshing.

[99] COURT REPORTER'S CERTIFICATE

I, William A. Davis, Official Court Reporter in and for the United States District Court for the Southern District of Mississippi, do hereby certify that the foregoing 98 pages contain a true and correct transcript of the proceedings had in this cause as recorded by me and transcribed under my supervision to the best of my skill and ability.

Witness my signature this the 19th day of December, 1968.

/s/ William A. Davis
Official Court Reporter

STIPULATION

It is agreed by and between the parties hereto that the following stipulation may be introduced at the hearing of plaintiffs' Motion for Supplemental Relief now set for hearing before the United States District Court for the Southern District of Mississippi, Eastern Division, on December 3, 1968, or as soon thereafter as can be heard, said stipulation being as follows:

1. That the attorneys for the plaintiffs have not received any complaint from any parent or any pupil residing in the geographical area of the Enterprise Consolidated School District or from any one attending any of the schools in said District concerning or in any way pertaining to the operation of the present "desegregation plan" as now in effect in said District, and the present pending motion, hereinabove referenced, is not predicated upon or based upon any written complaints received from any such pupil or their parents.

2. That insofar as the operation of said freedom of choice plan now in effect in said School District is concerned, the pupils and parents in said District have been free from any overt coercion, intimidation or interference from any parties in any way connected with the school system or from anyone else in connection with the school in the District to which they make application to attend.

THIS DONE, this 3rd day of December, 1968.

/s/ Robert E. Covington, Jr.
Attorney for The Enterprise Consolidated School District, et al.

/s/ Reuben V. Anderson
Attorney for Plaintiffs

AFFIDAVIT OF T. R. CHISOLM, SUPERINTENDENT, AND J. K. SHORT, CLYDE STEWART, B. F. JONES, J. C. GRAHAM, M. D., AND BILLY WILLIAMS, TRUSTEES OF THE ENTERPRISE CONSOLIDATED SCHOOL DISTRICT PURSUANT TO ORDER DATED JULY 31, 1969

Personally appeared before me, the undersigned authority in and for said county and state, T. R. Chisolm, Superintendent, and J. K. Short, Clyde Stewart, B. F. Jones, J. C. Graham, M. D., and Billy Williams, Trustees of The Enterprise Consolidated School District of Clarke County, Mississippi, who being by me first duly sworn stated as follows:

1. That T. R. Chisolm is the Superintendent and J. K. Short, Clyde Stewart, B. F. Jones, J. C. Graham, M. D., and Billy Williams, are the Trustees of The Enterprise Consolidated School District of Clarke County, Mississippi, and that said affiants make this Affidavit pursuant to the Order of this Court dated July 31, 1969, in order to present the additional facts herein set forth to the Court in support of the desegregation plan heretofore filed by The Enterprise Consolidated School District in the above styled and numbered cause.

2. The general highway map of Clarke County, Mississippi, attached hereto as "Exhibit A" and the information thereon with regard to geography, political boundaries, school boundaries, and statistical information relative to pupils and their residence is true and correct.

3. The statistical information relative to schools wholly or jointly owned by The Enterprise Consolidated School District and the residence and attendance patterns of students attending said schools contained on "Exhibit B" hereto is true and correct.

4. Attached as "Exhibit C" hereto is a true copy of the existing contract between The Lauderdale County School District and The Enterprise Consolidated School District relative to the operation of Clarkdale Attendance Center and students residing in the Clarkdale Attendance Zone of The Enterprise Consolidated School District and the Meehan Attendance Zone of The Lauderdale County School District.

5. Attached as "Exhibit D" hereto is a true copy of a proposed amended contract between The Lauderdale County School District and The Enterprise Consolidated School District relative to the operation of the Clarkdale Attendance Center and pupils residing in the Clarkdale Attendance Zone of The Enterprise Consolidated School District and the Meehan Attendance Zone of The Lauderdale County School District.

6. Attached as "Exhibit E" hereto is a true copy of the existing contract between The Quitman Consolidated School District and The Enterprise Consolidated School District relative to the transfer of pupils residing in the Stonewall Attendance Zone of The Quitman Consolidated School District (which formerly was a part of The Enterprise Consolidated School District) to schools administered by The Enterprise Consolidated School District.

7. The present outstanding bonded indebtedness of The Enterprise Consolidated School District reflecting funds borrowed to provide school facilities in the District is $331,000.00.

8. The present balance due the State Educational Finance Commission of the State of Mississippi for funds loaned to The Enterprise Consolidated School District to construct facilities for the pupils in said District is $88 838.94.

9. Initial enrollments of pupils attending schools administered by The Enterprise Consolidated School District for the past five years is:

	Enterprise High School			Central High School	Grand Total
Year	Black	White	Total	Black	
1964	0	498	498	457	955
1965	26	469	495	385	880
1966	67	430	497	284	781
1967	97	408	505	238	743
1968	96	414	510	264	774

10. The foregoing records reflect a decrease in total initial enrollment in The Enterprise High School and Central High School from 955 in 1964 to 744 in 1968, being a decrease of 181 pupils, or a decrease of nineteen per cent (19%) of the 1964 initial enrollment. Under Mississippi Law, most of the funds used by a school district in the operation of its schools are received either from the State of Mississippi or the United States of America on the basis of average daily attendance of pupils enrolled in schools administered by the district.

11. The foregoing facts demonstrate beyond doubt that The Enterprise Consolidated School District is dependent for its financial solvency, the quality of its educational program and its very existence upon pupils who reside outside of The Enterprise Consolidated School District but who have elected to attend the schools administered by The Enterprise Consolidated School District.

12. The Quitman Consolidated School District is a party to this same suit, and both the plans of the Department of Health, Education and Welfare and the Board of Trustees of The Quitman District call for the closing of

Stonewall Elementary School, which is located in the Stonewall Attendance Zone of The Quitman Consolidated School District and presently accommodates approximately 155 white pupils in grades one through six.

13. If and when Stonewall Elementary School is closed, the Enterprise Elementary School must be prepared to accommodate additional students from the Stonewall Attendance Zone of The Quitman Consolidated School District who will, without doubt, elect to attend school at Enterprise.

14. The Lauderdale County School District is under Court order in Cause No. 1367(E) on the docket of this Court. The plan submitted by the Department of Health, Education and Welfare calls for the closing of Clarkdale High School, while the plan submitted by the Board of Trustees of The Lauderdale County School District calls for increasing Clarkdale High School by the addition of black students who formerly attended Middleton High School. It is the considered opinion of the undersigned affiants that Clarkdale High School should be maintained as a twelve grade attendance center for all pupils residing within the Clarkdale Attendance Zone of The Enterprise Consolidated School District and in the Clarkdale Attendance Zone of The Lauderdale County School District.

15. In the event that Clarkdale High School is closed or is converted to an elementary school serving only grades one through eight, Enterprise High School must be prepared to accommodate students in the Clarkdale Attendance Zone of The Enterprise Consolidated School District and who formerly attended Clarkdale High School in the event that any such students should then choose to attend Enterprise High School.

16. Under any zoning plan placed into effect in The Lauderdale County School District, the black students residing in the Meehan Attendance Zone of The Lauderdale County School District who formerly attended Middleton High School will be required to attend school in The Enterprise Consolidated School District pursuant to existing and proposed amended contracts between The Lauderdale County School District and The Enterprise Consolidated School District. Enterprise High School and Enterprise Elementary School must be prepared to accommodate such students.

17. The Jasper County Consolidated School District, which is adjacent to The Enterprise Consolidated School District on the west and from which The Enterprise Consolidated School District receives 61 white students residing in the Rose Hill Attendance Zone is not under Court order, operates two all black schools and has no significant desegregation. The Enterprise Consolidated School District must be prepared to lose the students presently attending Enterprise School and residing in the Rose Hill Attendance Zone if they should flee further integration of The Enterprise School, and at the same time, The Enterprise Consolidated School District must be prepared to accommodate additional black and white students residing in the Rose Hill Attendance Zone of the East Jasper County Consolidated School District in the event such students should elect to attend school at Enterprise.

18. The Newton County School District, which joins The Enterprise Consolidated School District on the northwest corner thereof is not under Court order, operates more than one black school and has no significant desegregation. The Enterprise Consolidated School District must be prepared to accommodate additional students residing in

Newton County who may elect to attend school at Enterprise in the event that the Newton County schools are desegregated, and at the same time, The Enterprise Consolidated School District must be prepared to adjust to a loss of students from The Enterprise Consolidated School District to The Newton County School District in the event such students flee The Enterprise Consolidated School District because of integration.

19. Enterprise High School is the most integrated school in the State of Mississippi, of which your affiants have knowledge. As reflected by "Exhibit B" ~~hereto~~, twenty seven per cent (27%) of the black pupils attending school in the district attend with white pupils at The Enterprise High School. This is eleven per cent (11%) greater than the erroneous statistic of sixteen per cent (16%) relied upon by the United States Court of Appeals for the Fifth Circuit in its Opinion of July 3, 1969.

20. As reflected by "Exhibit D-3 (Enterprise)" to the testimony introduced at the hearing in this cause on December 3, 1968, a copy of which is attached as "Exhibit F" hereto, the plaintiffs stipulated that there had been no harassment or other intimidation of black students resulting from any efforts on their part to attend Enterprise High School.

21. In the Opinion of this Court in this case rendered May 13, 1969, the Petition of the Plaintiffs was dismissed on a motion of The Quitman Consolidated School District, and this Court has never considered the merits of the testimony adduced at the hearing in this case on December 3, 1968, with regard to The Enterprise Consolidated School District. It is clear from the record that except for the continued existence of an "all Negro" school in The Enterprise Consolidated School District, "Freedom

of Choice" has worked and is working in The Enterprise Consolidated School District.

22. It is the considered opinion of your affiants that "Freedom of Choice" is in fact working in The Enterprise Consolidated School District, but that if the district is not to be permitted to continue the use of the "Freedom of Choice" plan of desegregation because of the continued existence of an "all Negro" school in the district, then the only possible alternative plan requires that Central School be closed and all of the students accommodated at the Enterprise High School. *Both the Department of Health, Education and Welfare and the Board of Trustees of The Enterprise Consolidated School District agree on this point.* It is the firm belief and considered opinion of the undersigned affiants that white pupils residing in The Enterprise District will flee to other schools rather than attend Central School because of its previous character as an "all Negro" school.

23. The operation of two high schools in the past in The Enterprise Consolidated School District has required the employment of "excess faculty" because of the small size of Central High School. If Central High School is to be closed and consolidated with Enterprise High School, then more than two years is required in which to effect the transition in order to avoid the involuntary discharge of any teachers in the district. It is the opinion of the undersigned affiants that if the plan submitted by the Board of Trustees of The Enterprise Consolidated School District is approved, and they are permitted to effect the consolidation of the two schools over a three year period at the rate of four grades a year, the "excess faculty" can be accommodated through voluntary attrition, retirement, and relocation rather than involuntary termination.

24. The undersigned affiants are advised and believe, and upon such information and belief state that because of policy established by the executive branch of the United States Government, representatives of the Department of Health, Education and Welfare could not and did not in preparing their proposed plan consider the foregoing facts regarding the effect of the decrease or increase in pupil enrollment in the district by reason of out of district transfers, and that because of similar policy, could not and did not consider a plan which required more than two years to accomplish. Affiants believe that failure to consider such facts in this case and rigid inflexibility with regard to time is in violation of the responsibility of the school board, and this Court as defined in Brown II which states that the school board and the Court must consider each case on its own peculiar facts and merits, and devise such plan as the facts of the case require. A uniform national policy as to details and time tables is not required and is not in the best interest of the pupils.

25. If the plan submitted by the Board of Trustees of The Enterprise Consolidated School District is approved by this Court, it is the considered opinion of the undersigned affiants that The Enterprise Consolidated School District can and will accommodate all pupils of any race who may *choose* to attend Enterprise Elementary School.

26. It is apparent from the foregoing facts that The Enterprise Consolidated School District cannot accommodate at the Enterprise School immediately all pupils who *might* choose to attend Enterprise School on a transfer basis, while at the same time, it is entirely possible that pupils presently attending Enterprise School may flee the district to escape a high degree of integration, and for such reason there may be more facilities at Enterprise School than will be required. In any case, it is the consid-

ered opinion of the affiants that if the plan submitted by The Enterprise Consolidated School District providing for the closing of Central High School over a period of three years is approved, that over such period of time The Enterprise Consolidated School District will be able to provide whatever facilities are required at the Enterprise School to accommodate all pupils who may choose to attend said school by transfer or otherwise.

IN TESTIMONY WHEREOF, said affiants have hereunto affixed their signatures on this the 20th day of August, 1969.

T. R. Chisolm	J. K. Short
Clyde Stewart	B. F. Jones
J. C. Graham, M. D.	Billy Williams

Sworn to and subscribed before me, this the 20th day of August, 1969.

.....
Notary Public

My Commission Expires: .....

CERTIFICATE OF SERVICE

I hereby certify that on this the 20th day of August, 1969, I caused to be served by United States mail, postage prepaid, a copy of the foregoing Affidavit of T. R. Chisolm, et al., upon Reuben V. Anderson, Fred L. Banks, Jr., John A. Nichols, and Melvyn R. Leventhal, Attorneys at Law, 538 1/2 North Farish Street, Jackson, Mississippi 39202.

Robert E. Covington, Jr.

STATISTICAL INFORMATION RELATIVE TO SCHOOLS WHOLLY* OR JOINTLY OWNED BY THE ENTERPRISE CONSOLIDATED SCHOOL DISTRICT

Enterprise Consolidated School District enrollment, ninth month, 1968-69 session:

Central School (Grades 1 - 12)	263 B
Enterprise School (Grades 1 - 12)	405 W
	100 B
Total District Enrollment	768

RESIDENCE AND ATTENDANCE PATTERNS OF STUDENTS ATTENDING THE ABOVE SCHOOLS:

1968-69 Ninth Month Enrollment	Schools: Central B	Central W	Enterprise B	Enterprise W	Clarkdale B	Clarkdale W
1. Enterprise Attendance Zone students of the Enterprise Consolidated School District	163	0	38	229	0	0
2. Stonewall Zone students of the Quitman Consolidated School District	73	0	62	54	0	0
3. Rose Hill Zone students of the East Jasper County Consolidated School District	0	0	0	61	0	0
4. Meehan Zone students of the Lauderdale County School District	0	0	0	61	0	0
5. Clarkdale Zone students of the Enterprise Consolidated School District	27	0	0	0	0	205
6. Clarkdale Zone students of the Lauderdale County School District	0	0	0	0	0	288
PROJECTED ESTIMATES 1969-70 SESSION ENROLLMENT						
1. Enterprise Attendance Zone students of the Enterprise Consolidated School District	125	0	76	229	0	0
2. Stonewall Zone students of the Quitman Consolidated School District	44	0	91	54	0	0
3. Rose Hill Zone students of the Lauderdale County School District	0	0	0	61	0	0
4. Meehan Zone students of the Enterprise Consolidated School District	20	0	25	61	0	0
5. Clarkdale Zone students of the Enterprise Consolidated School District	28	0	0	0	12	205
6. Clarkdale Zone students of the Lauderdale County School District	0	0	0	0	100	288
TOTALS: 1968-69	263	0	100	405	0	493
1969-70	217	0	192	405	112	493

* 1. The Enterprise High School and the Central High School are wholly owned and administered by the Enterprise Consolidated School District

2. The Clarkdale High School is jointly owned by the Enterprise Consolidated School District and the Lauderdale County School District and administered by the Lauderdale County School District pursuant to contractual agreement between the two referenced districts.

APPENDIX 3

PORTIONS OF THE TRANSCRIPT IN JOHN BARNHARDT v. MERIDIAN SEPARATE SCHOOL DISTRICT

[3] *Direct Examination of* PAUL L. FRANKLIN

BY MR. COMPTON:

Q. What is your name, sir? A. Paul L. Franklin.

Q. And where do you live? A. In Meridian, Mississippi.

Q. And by whom are you employed? A. By the Meridian Municipal Separate School District.

Q. And what is your title? A. Assistant Superintendent for Business Affairs.

Q. Do you hold any academic degrees? A. Yes. I have a B. S. degree from Livingston University, [4] Livingston, Alabama in Business Administration, and a Master's degree in Educational Administration from the University of Southern Mississippi.

Q. Describe your duty,—how long have you been employed by this Separate School District? A. Since April 28th, 1947.

Q. Describe your duties. A. I have the responsibility to the Superintendent for the administration of the business operation of the Separate School District. This embraces everything except those things that are termed instructional. It covers budgeting, finance, transportation, cafeteria operation, school house planning and construction, maintenance, operation, insurance, etc.

Q. Were you familiar with these affairs of the Meridian Municipal Separate School District in 1953? A. I was.

Q. Did the Meridian Municipal Separate School District have a dual system at that time? A. We did.

Q. Name the items that this district did in the realm in which you have just discussed, that were dual in 1953. A. Well, in 1953, we had no teacher salary schedule. All

teachers were employed for what you could get them for, [5] and the Negro teachers were paid less, considerably less than the White teachers. We had no salary schedule for non-instructional or classified personnel, and the Negro employees were paid less. Our school bus transportation at that time, the older busses were used to transport the Negro youth and the newer busses were always used for the transportation of the White children. We had no Physical Education program or Public School Music program in the Negro schools, whereas we did in the White. We had no uniform budgets for the School System as a whole, but rather separate budgets for the Negro schools and the White schools. And the allocations to the Negro schools were always less. We had no uniform building construction, and the buildings that housed the Negro children were less adequate than those for the White. The equipment, we had no standardization of equipment in the classrooms, and the equipment in the classrooms of the Negro school was less adequate than in the White. We, in our cafeteria operation, we had separate menues for the Negroes and the Whites. This was based on the theory that the Negro child would not eat the same kinds of food that a White child would eat. In our free lunch program, the White children were favored in this. We had no uniform allocation of teachers and the White teachers had fewer pupils per teacher than did [6] the Negroes. We had fewer non-instructional or classified personnel in the schools that were Negro. Actually, two-thirds of the Negro teachers had less than a college degree at that time.

BY THE COURT: Mr. Compton, what's the purpose of going back to 1953? I think we all know about what conditions were back at that time. We are trying to what it has been the last year or two, since 1967.

BY MR. COMPTON: That is the next question, Your Honor.

BY THE COURT: Well, let's get along with it. We know what the conditions were throughout Mississippi, I think.

MR. COMPTON CONTINUES:

Q. What are the conditions today in the Meridian Separate School District with reference to these items about which you have just testified? A. We presently, and of course, since that time, we've been working toward this. We have a teacher salary schedule. All teachers are employed without regard to race on a single salary schedule, being paid the same, based upon their experience and qualification. We have salary schedule for all non-certificated or classified employees, and these are paid on the same salary schedule based upon their experience and training without regard to race. Our school buses are operated without regard to race, and as a bus [7] becomes in need of replacing, it's replaced without regard to race. We do have uniform budgeting, the allocations are made to the individual schools in operation, based upon the per pupil allocations, and this is without regard to race. We have uniformity in our building construction and this is also without regard to race. Our buildings have been corrected. The inadequacies and our buildings and equipment throughout the School District will be comparable without regard to race. We have central planning of menues for our school system. This is done with a committee of cafeterial managers from each individual school. This is on an integrated basis. We have in service training for our non-instructional or classified employees strictly on an integrated basis and this has taken place for at least ten years, now. We have all of our teachers now, with the exception of a few vocational shop teachers, have a degree or better, in regardless of what school they teach or regardless of the race.

Q. Have all of the items been brought and made uniform throughout the system without regard to race or—? A. Yes, they have.

Q. What is the size of the Meridian Municipal Separate School District? A. The Meridian Municipal Separate School District embraces approximately seventy-eight square miles. Within that area, [8] approximately twenty-eight square miles is within the municipal boundary.

Q. Where, within the district, does the bulk of the Negro population reside? A. I would say that the bulk of the Negro population would reside in the inner city, as I would refer to it.

BY THE REPORTER: What?

BY THE WITNESS: Inner city.

BY THE COURT: I still don't understand what you're saying. Inner what?

BY THE WITNESS: Inner city.

MR. COMPTON CONTINUES:

Q. And where would the bulk of the population, the White population, of the district reside? A. It would be in the suburban areas.

Q. Approximately what percent of the total Negro population resides within the inner city? A. I would estimate 85% would live within the inner city.

Q. Approximately what percent of the White population of the district reside within the suburban area, as you have described? A. Approximately 75%.

Q. How many schools, total number, do you have in the district? A. We operate nineteen schools.

[9] Q. How many of these are elementary schools? A. Thirteen elementary schools.

Q. Of the thirteen elementary schools, how many are traditionally Negro schools? A. Five.

Q. And the remaining— A. Eight.

Q. —are traditionally—? A. White, yes.

Q. Do you operate any junior high schools? A. We operate four junior high schools.

Q. And how many of these are traditionally Negro? A. Two.

Q. How many high schools do you operate? A. Two.

Q. And how many of these are traditionally Negro? A. One.

BY THE COURT: How many White?

Q. How many White high schools? A. One White high school.

BY THE COURT: And one Colored school? A. Yes, sir.

Q. Speak up. Generally, where are the traditionally Negro schools located? [10] A. Generally, within the inner city.

Q. And generally, where are the traditionally White schools located? A. Well, the majority of them would be in what I would term the suburban.

Q. Does the school system operate any transportation? A. Yes.

Q. Approximately what percent of your total enrollment do you transport? A. Approximately 4%.

Q. How many busses do you operate? A. We are presently operating eleven busses.

Q. And how are these busses routed with reference to race? A. They are routed without regard to race.

Q. Within the area that your department covers and your duties, do you know of any phase or facet of the school system that is not unitary? A. No, sir. I know of none.

Q. Mr. Franklin, when were these steps taken toward a unitary school system, and with reference to that, I mean did this take place within the last year or so? A. No, this took place gradually over a period of time, beginning with 1954. In 1954, we adopted a salary schedule for teaching personnel. This was the first step, I would [11] say, to this.

Q. And, what was the next step? A. Well, in 1958, we began integrated in-service program for our non-certificated personnel.

Q. And what was the next step? A. During this same period of time of, say '57, 1957-'58, we began an extensive construction program to try to make our schools uniform and all of them adequate.

Q. The other matters, the other items that have been made unitary, did they take part from year to year? A. Yes, they did. Of course, in 1958, we began uniform menues throughout the school system.

Q. When did you testify that the professional personnel policies was adopted by the board on the first occasion? A. I'm not, I don't remember the exact date on that, but I think it was in '54, but this can be verified by the Superintendent or Assistant Superintendent for Instruction.

* * *

[25] BY THE COURT: So whether or not they ride a bus, if they're entitled, if any child is entitled to ride a bus, depends on the school that they select?

BY THE WITNESS: That is right. He rides the bus that goes to the school that he has made a choice to go to.

BY THE COURT: All right.

MR. COMPTON CONTINUES:

Q. During the day, are these drivers assigned to transport children on a non-racial basis? A. They are.

Q. Does it frequently occur that a Negro bus driver will transport the predominently White children on a field trip? A. Oh, yes. Quite often.

Q. And the contrary likewise occurs? A. Yes.

Q. How is the riders on a specific bus determined? A. The riders on the bus are determined, I think, if I know what you're asking, is that we route buses in all of the outlying areas and we designate the school that they will attend. Now, all the children that live in those areas can choose a school, and it may be one that is predominently Negro or predominently White, and they will select the bus [26] that is going to that school that they have selected to attend.

* * *

[27] *Direct Examination of* ARNOLD VINCENT

BY MR. DEEN:

Q. State your name and address, please, sir. A. Arnold Vincent. I live in Meridian.

BY THE COURT: Your last name, please.

[28] BY THE WITNESS: Vincent. V-i-n-c-e-n-t.
BY THE COURT: Thank you.

* * *

[31] Q. And what did you do in that regard? A. Well, at that time, of course, when I came to Meridian, the in-service programs were desegregated. There was a lot of mixing of staff and teaching personnel even at that time. And they were working in schools in which they were in the minority. Several people were. I think two had specific assignments at that time.

Q. All right, sir. Now, go to 1966-67, or the summer before the school year of 1966. A. Well, since that time, I estimate that I would have interveiwed about 500 applicants for teaching positions in Meridian public schools. I would estimate that we have employed about half that number. Now, it has been, we have made a special effort to recruit people who we thought could teach successfully in a desegregated situation and in a school which they would be a minority race.

Q. In screening or interviewing applicants for teaching jobs, what standard or qualification, if any do you apply and if there is one, is it uniformally applied to all? A. It is. It is the responsibility of my office under the Superintendent to do the recruiting and screening of applicants. We involve other people in central office staff and in the schools in the interviews before we make assignments, but we require certified teachers, of course, [32] with degrees in Mississippi. We try to secure the best qualified people that we possibly can for the particular assignment or vacancy that exists.

Q. Would it be a fair statement to say that you are looking for the best available person for a particular job? A. Yes, sir, and without regard to race or creed.

Q. What evaluation of teachers or prospective teachers do you make with regard to teaching or working in a desegrated situation? A. Well, from the very beginning, the first year that we really worked at this, which was two years ago, we set up the criteria or qualifications that we thought should apply for people who would assume this

new responsibility, and our requirements were such that we ourselves knew that we could automatically eliminate a number of our teachers who could not, whom we did not think would, qualify for this assignment. We went down the list though, and did screen and interview quite a number of our teachers who were there at the time and this was our source of professional people to desegregate or to move into schools in which they were a minority at that time.

Q. And why? A. We thought it would require the best qualified teachers that were available and we had, we thought, the best [33] school teachers in Mississippi, and we selected the people from this group to move into the school of an opposite race, of a majority. Now, we were sure that we needed people who had experience, preferably teachers who had had some training or orientation in this direction. Not all teachers could successfully teach in a situation in which they're in the minority race.

Q. Is there a compulsory arrangement of assignment of teachers in your district, Mr. Vincent? A. No, sir. We use persuasion as much as we can, and I might point out in this first year we were not having too much success, so the Superintendent spent most of the summer I know interviewing people and succeeded in getting some to go in assignments where others of the central staff had failed.

Q. What other efforts did you make in the summer or prior to the summer of 1966 for the '66 school year towards obtaining teachers to teach in a desegregated situation? A. Well, we were running some school programs in a number of our schools in the summer of '66 for instance. We took all of our elementary White principals and quite a number of our teachers and gave them assignments in schools in which they would be in the minority to give them the experiences that would qualify them to teach, to accept an [34] assignment in a school in which they would be in the minority. And we gained considerable experience in this respect. Soon after this—Now, at this time, a number of our people attended institutes throughout the country. We had some of our teachers in institutes as far away as New York, St. Louis, all over the

country, Florida. I, myself, have attended a number of institutes.

Q. For what purpose? A. For the purpose of equipping myself to achieve the purposes of the freedom of choice and the desegregation of schools, faculty and student body.

BY THE COURT: Do you pay your teachers any bonus salary to teach in a school of opposite race?

BY THE WITNESS: No, sir, we have not.

BY MR. MURPHY: Mr. Vincent, I couldn't hear the Judge's entire question. Would you please let him finish before you answer, sir?

BY THE COURT: Did you hear my question?

BY THE WITNESS: I did.

BY THE COURT: You couldn't hear me, counsel?

BY MR. MURPHY: No, sir, I couldn't, Your Honor.

BY THE WITNESS: I'm sorry.

BY MR. MURPHY: He interrupted was the reason I couldn't hear you finish.

[35] BY THE COURT: You know what the question was, don't you? I want to know if they paid any bonus salaries to a White teacher who would go into a Colored school, and he said they didn't.

BY MR. MURPHY: Thank you, sir.

MR. DEEN CONTINUES:

Q. Mr. Vincent, would you state whether or not you tailored your in-service programs to meet the needs of the teachers and others in this regard? A. We have done this. Of course, our in-service program, as I indicated, been desegregated a long time. Long before I came to Meridian they were desegregated in-service activities going on, but since this time we have focused particularly on this one problem and we have had consultants from all over the country who were available to us and we have, in our biracial in-service program, attempted to qualify ourselves to more effectively deal with this problem.

Q. What results did you obtain for the 1966-67 school year with regard to teacher or faculty desegregation? A.

That particular year, we had twenty teachers, I believe, who—Pardon me, did you say for '65?

Q. 1965-66, you had two that year on a voluntary basis? Before that plaintiff required you to? [36] A. Right.

Q. All right. 1966-67, you had how many? A. About twenty.

Q. Mr. Vincent, what about 1967-68? Was it more difficult or was it easier that year to obtain teachers to teach in a desegregated situation? A. Well, it was quite difficult to obtain. I think I might have misled you. I think your question was a year earlier. '67-68 was the year that I meant to say that we had twenty. Actually, we had twenty-two different people, but at one time twenty was the number of teachers teaching in a desegregated—

Q. Did I give a year too early? A. I think I did.

Q. All right, sir. Would you clarify that then? Let's start with the first year that you had the two. A. Well, that was the year '65-66.

Q. All right, what about '66-67? A. No, I'm still a year ahead of myself there, I believe. '67-68 was the year that we had the twenty.

Q. All right, sir. What about this year, '68-69? A. This year we have forty teachers teaching in, with an assignment in a school in which they are of the minority race. In addition to this, we have eleven staff personnel [37] who work in all schools, both traditionally Negro and traditionally White.

Q. Mr. Vincent, was it easier or more difficult to get teachers this year to teach in that situation than it was for '67-68? A. It was easier, partly because of our experience in the previous year, partly because we started recruiting teachers outside the Meridian district for this purpose.

Q. At first, you were recruiting from inside the district with the teachers you already had. Is that what I understand your testimony to be? A. That is correct.

Q. Now, have you discovered that there is any difference between the ease with which new teachers get along in this situation as compared to ones who had al-

ready been in the system? A. Fortunately, the colleges and universities are now providing some training for these young teachers who are coming out. They are gaining some orientation into the problems of teaching in a community that would be different to the one that they might have come up with. So, I would say that some of our better teachers in this area are new teachers now.

Q. Mr. Vincent, in the 1967-68 school year, were you able to fill all teacher vacancies? [38] A. No, sir. '67-68, we did not fill all of our vacancies.

Q. What did you do? A. There was a shortage of teachers and we used all of our resource of substitute teachers. We brought back into the teaching a number of people who had retired or who did not need to teach but was willing to under the circumstances. But we operated the schools the entire year short in some areas.

Q. Do you have now at the present time, some teachers both White and Negro, who would be willing to teach in a desegregated situation but which you have not been able to place because of some reason or other? A. Yes, sir.

Q. And what is that reason? A. In many cases, some of our better teachers we could not, we elected not to move them from the school which they were working because we could not satisfactorily replace them. They were key people in the particular schools, and we tried to maintain or improve the quality of education in every instance where we transferred people. Another reason that we didn't transfer some people—some were willing to transfer that we did not think would qualify.

[41] Q. Mr. Vincent, based upon your experience, your observation, and other work you have done with the Meridian school district, what is your best judgment about whether or not the freedom of choice plan is working?

BY MR. MURPHY: And I object, Your Honor. Calls for a—

BY THE COURT: I overrule that. Let him answer. [42] A. I'm looking at some figures here, Mr. Deen, that would indicate that the first year that we went into the program, in '65-66, we had twenty Negro students to choose traditionally White schools. The next year, 103.

BY THE COURT: Let me see. Let me get your first year.

A. The first year was 20. That was '65-66. This next year was 103 Colored children chose traditionally White schools. In '67-68, 253. In 1968-69, 457. There has been about 100% increase every year in both the faculty desegregation and the student population desegregation in schools.

BY THE COURT: Was that in all the schools or just some of the schools get that concentration of—

A. Just some schools, Your Honor. One school that was traditionally all White has an enrollment of 28% of the students are Negro. We have two schools—

Q. What school is that, please, Mr. Vincent? A. This is Chalk. The Chalk Elementary School.

Q. While you're on Chalk, would you describe for the Court, if you know, how that percentage has increased from '65-66 down to present. A. It moved from the first year it was 8.

Q. And what percentage was that of the enrollment? A. Two percent.

Q. All right, sir. [43] A. The next year 17 with 4%. The next year was 48 with 14%. This year there's 97 or 28%.

Q. Would you name for the Court, if you know, the other schools in the Meridian district, traditionally all White, at which there are now or have been enrolled Negro students. A. The Witherspoon Elementary School which serves one through six.

BY THE COURT: Could you give us a breakdown of all of them while you're at it? Does this man know that answer?

BY MR. DEEN: I think he does, Your Honor. I'll be glad to.

BY THE COURT: Why don't you take it school by school there and give us a breakdown, total student enrollment, how many Negro and how many White.

BY MR. DEEN: Very well, I'll be glad to, Your Honor.

Q. Taking the Chalk school, Mr. Vincent, you have given the enrollment of Negro students and percentages. Would you state to the Court the total enrollment of that school beginning with the year '65-66 coming on down through the four year period. A. The total enrollment in that school was 431 in 1965-66, with 8 of that group Negro children. In '66-67, it was 408 total, with 17 of that group Negro children. In 1967-68, 336 total enrollment, 48 Negro children. In 1968-69, there's a total of 352, ninety-seven of whom are Negro.

[44] Q. Would you take—

BY THE COURT: What would you say that's the cause of that growth in that school? Any particular reason?

A. Yes, sir, very definitely. The reason is that the children are getting the best education possible, they're being accepted. They go back, they're the best recruiters we have. We don't have to influence the choice if we do a good job within the school.

* * *

[47] Q. And what about Meridian High School? A. Meridian High School serves grades ten, eleven and twelve. In 1965-66, the total enrollment was 1654 with five of these Negro.

BY THE COURT: Is that the one that's got that good football team with that great big full back on it?

BY THE WITNESS: He enrolled the next year, Your Honor.

BY THE COURT: These traditionally White schools don't like to play him, do they?

BY THE WITNESS: No sir. We're having difficulty getting the schedule done.

BY THE COURT: I don't blame them from what I understand his operation is. Go on. Excuse me.

BY THE WITNESS: In 1966-67, there were 1689 children, 49 of whom were Negro. In 1967-68, there were 1780, one hundred thirty-two of these were Negro. In 1968-69, the total enrollment is 1842, two hundred and one of whom are Negro. I saw another figure that had that 199, I believe, so [48] somebody must have dropped out.

Q. To the best of your knowledge, the enrollment figure is 201 for Meridian High School for this year? A. This year. Eleven percent of the students in that school. This represents one out of every four Negro High School student in Meridian is attending an integrated school.

Q. Do you mean by that that out of the total Negro student high school population, one-fourth are attending this one particular school? A. Yes, sir.

Q. Mr. Vincent, do you have any judgment as to what increase, if any, there will be in faculty desegregation for next year under this plan? A. Mr. Deen, we have promises from a number of our teachers who have committed themselves in the best interest of public education in Meridian to agree to accept assignments in schools in which they would be in the minority with the understanding that they would have a choice of going back to the previous school the next year. Now, we have not used this type of persuasion very much up to now. Apparently, our teachers, this is being accepted in that more of our people are expected to accept the challenge.

Q. I note that from your testimony the number has doubled from twenty to forty or more from '67 to '68. Do you [49] expect it to double again at least for next year? A. I would think so. I would anticipate that it would. There is a level of acceptance of this freedom of choice plan now that would permit an accelerated increase.

Q. Are you speaking of community attitude or teacher attitude or what? A. Both, and student attitude, and everybody's acceptance.

• • •

[55] BY THE COURT: No, sir. My question was did any Colored child who got into a White school and wanted to withdraw, was there any instance where the request to withdraw was occasioned by any influence or pressure of any kind brought to bear on that child?

BY THE WITNESS: No, sir.

BY THE COURT: All right.

MR. DEEN CONTINUES:

Q. In your view, Mr. Vincent, will there be further integration of students in the future in Meridian? A. I think with the attitude of acceptance that we have in the community that you could assume this, definitely.

Q. What is your own view about it? What is your own best judgment about that? A. Well, I think so. I think it will accelerate

Q. Have you had any complaint from anyone in the district that any student does not have a free choice? A. I have not.

Q. Has the plan in Meridian been administered insofar as you know in accordance with the Jefferson decree? A. It has.

Q. And does that plan in your best judgment offer a realistic promise of continued success?

BY MR. MURPHY: I object, Your Honor.

[56] BY THE COURT: Restate your question.

Q. Does the Jefferson plan in the Meridian district offer a realistic promise, in your best judgment, of continued success in the future?

BY THE COURT: I overrule the objection. Let him answer.

BY MR. DEEN: Judge said you may answer.

A. Yes, I think it offers the best possible solution to the problem.

Q. And I'll ask you your reasons why you say that, Mr. Vincent? A. Well, it is working now very successfully and we think it will continue to do so because of the attitude of acceptance on the part of everybody. And

everybody's working to make it succeed and in such cases you don't normally fail.

BY THE COURT: Would any other plan accomplish a more rapid desegregation without doing some violence to your education processes?

BY THE WITNESS: I personally do not think it would. I do not think that any other plan would succeed as well as the plan that we are now using.

BY THE COURT: Would the pressure which would accompany any order for mixing have any effect on the community and the schools?

BY THE WITNESS: Yes, sir, I think there would be an adverse [57] reaction.

* * *

[73] *Direct Examination* of MRS. JEANIE RUTH CRUMP

BY MR. COMPTON:

Q. Please state your full name. A. My name is Jeanie Ruth Crump, C-r-u-m-p.

Q. Where do you live, Mrs. Crump. A. I live in Meridian.

Q. And how long have you lived there? A. I have lived there all of my life. I was born in Meridian.

Q. By whom are you employed? [74] A. I am employed by the Meridian Municipal Separate School District.

Q. And how long have you been so employed? A. I have been employed in the Meridian public school system since 1938, which makes thirty years.

Q. And what position do you now hold? A. I am now principal of the Wechsler Elementary School.

Q. Do you hold any academic degrees? A. Yes, I have a Bachelor of Arts degree from Rust College in Holly Springs, Mississippi, and I have a Master of Education and Administration from Tuskegee Institute.

Q. Do you have any additional work beyond the Master's degree? A. Yes. I have done classes at the Uni-

versity of Southern Mississippi and last summer I was enrolled at the University of Ole Miss in a project with Early Childhood Education, and I have also studied at Denver University.

Q. Are you a member of any professional organizations? A. Yes, I am a member of the National Education Association, and of the American Teachers Association, of The National Elementary Principals Association, The National Classroom Teachers Association, the Department of Early Childhood Education, a member of the Mississippi Teachers Association, the Fifth Educational District Association, the State Association of Principals and Supervisors, the Meridian [75] District Teachers Association.

Q. Do you hold any position at the present time with the Mississippi Association? A. Yes, at this time I'm Parliamentarian of the Mississippi Teachers Association and I'm Chairman of the Study Group Committee for the State Principals and Supervisors Association.

Q. Are you a member of any other commissions or committees? A. Yes. For three times I have served as Secretary of the Mississippi Teachers Association, and I have served as chairman of the program committee for the Mississippi Teachers Association, and at this time, as a member of the executive committee, I am also working on the merger committee for the merging of the MEA and the MTA.

Q. In short, the merger of the former Negro professional teachers organization and the former White teachers professional organization, into one? A. Yes. That is true. This has to be done, I believe. The proposals must be ready, I think it is, I'm not too sure, by April of 1969.

BY THE COURT: Is that a voluntary merger?

BY THE WITNESS: Well, Your Honor, maybe involuntary voluntary, I'm not sure, but well, we have to, if we're going to remain as members of the National Education Association.

[76] They have given us the ultimatum us to when we must have these.

BY THE COURT: No Court has ordered you to do this?

BY THE WITNESS: No, no.

MR. COMPTON CONTINUES:

Q. Are you a member of any Civil Rights organizations? A. I have been involved in Civil Rights since I was a child. I'm a protege of Mary McCall Bethune and Elenor Roosevelt and I have been since I was a youth and I still am.

Q. What Civil Rights organizations are you members at this time? A. I am a member of the NAACP. I'm a member of the Black Methodists of the United Methodist Church. I suppose that my husband has paid our dues in the Southern Christian Leadership. I'm a member of the Fellowship of the Concerned and I'm also a very active in the Board of Social Concerned of the Methodist Church, and also the National Council of Negro Women.

Q. In short, are you an active participant in Civil Rights movements? A. I am, because I do not feel that I could be really a leader, whatever that might be, of my people unless I was concerned about every aspect of their development. And since I have been old enough to have any idea I have [77] been concerned about the rights of my people.

Q. As principal of Wechsler, have you had a part in the administration of the freedom of choice plan adopted by the Meridian Municipal Separate School District? A. Yes, this is a part of my responsibility and I assume it in accordance with what is required. We have to send letters to the parents.

(BRIEF INTERRUPTION IN THE TESTIMONY.)

[78] Q. You sent letters to the parents? A. Yes, and we informed them in parent-teacher conferences; we informed them in the PTA meetings; we informed them through bulletins which were put out especially for our parents; and we informed them through the medium home-room mothers; we also informed them through the medium of teacher aides who do visitation in the homes of the

parents, along with the other media of communication through public facilities.

BY THE COURT: Let me ask you this. Are you familiar with this Jefferson decree that the Court has placed on the Meridian schools?

BY THE WITNESS: Well, yes, I know that we are under this, but, Your Honor, to say that I am very intelligently acquainted with it, I cannot say that. I do know that we are under its orders.

BY THE COURT: Are you familiar with the provision which keeps any teacher or official of the school from trying to persuade some child or parent to go into another school?

BY THE WITNESS: I am thoroughly intelligent of that, Your Honor, and very much aware and not only that but concur with this order.

BY THE COURT: You think that is the right course to pursue?

BY THE WITNESS: Yes, I'm very sure.

[79] BY THE COURT: So that hasn't interfered with you then, has it?

BY THE WITNESS: No, it has not. I think that this is the American way. I think if we're going to teach people to be intelligent thinkers, I think that this is a part of it.

BY THE COURT: I don't know whether you understood my question according to your answer.

BY THE WITNESS: Well, excuse me, Judge. Perhaps I didn't.

BY THE COURT: Let me read that provision to you so we'll be talking about the same thing.

BY THE WITNESS: Yes, sir, I'll be very happy.

BY THE COURT: It enjoins the school official not to influence choice. "At no time shall any official, teacher, or employee of the school system or any other person influence any parent or other adult person serving as a parent or any student in the exercise of a choice or penalize any person because of a choice made."

BY THE WITNESS: Yes, sir.

BY THE COURT: You understand what that says?

BY THE WITNESS: Yes, sir. Now, what was your question, Judge?

BY THE COURT: My question is to whether or not that has kept any teacher who wanted to advise some child what school to go to, has kept that teacher from trying to persuade that child to go to a school that the teacher thought the [80] child ought to go to?

BY THE WITNESS: Oh, yes, sir, Judge, it has. We have concurred with that, and no—

BY THE COURT: You obey that?

BY THE WITNESS: I agree to that.

BY THE COURT: Well, you did understand then?

BY THE WITNESS: Yes, sir.

BY THE COURT: All right.

(THE COURT CONTINUES:)

You say that you agree with that but yet you say you've been promulgating in your leadership in all these organizations for your race. You still think that you're not in a position to advise students that you have under your supervision as to the best qualifications or aptitudes of students?

BY THE WITNESS: Well, I thought you meant under the present order under which we have been working because this was against the law. We could not do that.

BY THE COURT: That's right. That's what Judge Cox just said.

You're under order that you cannot do it, but do you agree that that is the best, do you concur that that is good for the school?

BY THE WITNESS: Well, now I understand what you were talking about. I think perhaps maybe that there are occasions [81] where it would be well if this could be done. I think there are situations where the teacher or other officials might be able to help people to make decisions.

BY THE COURT: You are principal of a school that's 489—

BY THE WITNESS: That's right.

BY THE COURT: —all Colored, aren't you?

BY THE WITNESS: That's right.

BY THE COURT: If you did not have this restriction on you, would you try to influence some of them to go into previously all White schools?

BY THE WITNESS: No, I would not try to influence them, but I feel that maybe if this ban were not there and they asked me a suggestion, I might probably give them some information that might help them to make a decision.

BY THE COURT: But, you are in position to help them make a decision.

BY THE WITNESS: Yes, but,—that is true.

BY THE COURT: And would you have 489 pupils there all Colored if you thought that it would be best for them to go into one of these others, previously all White schools?

BY THE WITNESS: Well, now, if I thought it would be best for them to go into an all White school, but I don't feel that I really have that much authority as to say whether this would be best for them to go into an all White school, [82] because there are many things involved as to what would determine whether it would be best for a child to go into an all White school.

BY THE COURT: I imagine your lawyer is going to ask you that question, so I won't get into that.

MR. COMPTON CONTINUES:

Q. Mrs. Crump, in your work as principal, do you have a broad contact with the Negro community? A. Yes, I have a broad contact with the Negro community because the first place, that is my philosophy of administration, is that I must know the community and I must have broad contact and information about those with whom I am going to deal so closely and about those with whom I am going to work.

Q. In your work in Civil Rights organizations, do you have an even broader contact with the Negro community in your city? A. Yes, I have an even broader contact with them, stemming all the way back to the 1954 decision and all the way through because of the fact that you are dealing with all facets of the community, and you are dealing with all sections of the community and this is the way that you really have the opportunity to be somewhat of a liaison between all facets of the Negro community as well as all [83] facets of the all White community.

Q. With your broad contact with the entire Negro community, do you know of any fear of retaliation, any hostility, or any type of pressure that has been applied by the White community or by anyone to keep Negro children from choosing formerly all White schools? A. I do not personally know.

Q. Have you heard of any? A. I have not heard of any.

Q. Do you know of any violence, threats of violence or economic reprisals by Whites or anyone else against the Negro children to keep them from choosing formerly all White schools? A. Not since about the first year that this attempt was made, but not in the recent years. I would say not in the past four years, no.

Q. Not in the past how long? A. Not the past four years.

Q. Do you know of any public officials or school officials who has improperly influenced or sought to influence the choice of the Negro children? A. Not any.

Q. Do you know of any special fees that are assessed against the Negro children for courses that are available only to [84] Whites? A. No, I do not know of this, and I think it is not naive to say that this would hardly be practical because of the procedural program that we have in Meridian. This would not really be likely.

Q. Do you know of any special facilities or equipment that has been constructed or installed in Negro schools for the purpose of trying to keep the Negro children in these formerly all Negro schools? A. Well, this would

hardly be possible either, because of the procedures through which we have to go. All principals, first a requisition and the assessment of all facilities of every school in Meridian has to be done by the classroom teacher and then the principal, and then the requisitions are directed to the school board. But I would like to say here, too, that not only for myself but I think that the Negro principal has come more into the image of leadership that first place. I don't think that we would even let the White man think that he could fool us like this, not any longer.

Q. Are you aware of any effort or any practice by the Meridian Separate School District to discourage Negroes from choosing formerly all White schools? A. No. Not any.

[85] Q. State, in your opinion, whether or not there has been an honest, to goodness real freedom of choice in Meridian, Mississippi. A. Well, I believe that it has so far as I know.

Q. And in your position would you have heard of any complaints had they come? A. Yes, I'm very sure that I would have heard of them because the faction would have been given to me and I am sure that if we had we would have directed these to the superintendent and to the school board.

Q. How many teachers do you have in your school? A. Well, for a teaching staff, we have twenty-four. We have seventeen regular classroom teachers. We have one part-time librarian for this year. Last year she was full time librarian, but we do not have this many librarians in the elementary school this year, and of course, she is fifty-percent in our school. And we have part time speech therapisty, and we have a part time reading specialist, and we have a part time music teacher.

Q. What is the racial composition of your faculty? A. We have four regular classroom teachers, our librarian, the part-time librarian is a White librarian, and our speech teacher, part time, I mean—excuse me—reading specialist is a White teacher.

[86] Q. Did I understand you to say four full time classroom teachers plus these part time? A. Yes. We have

two second grade teachers. We have one fourth grade teacher; and we have one fifth grade teacher. Only one of these teachers is an imported teacher. The other three are Meridian teachers. They are native Meridianites.

Q Do you have any White students in your school? A No, not that we actually can say. It is said that perhaps we do have three White children but we are not able to prove this. So far as I know all of the children at Wechsler School are Black children.

Q In your opinion, will you ever have White students attending your school? A Yes, I think that we will have White children attending our school. Really, we would have had I think it was about four, one lives just two blocks from the school but the child's grandmother died, the father was a store owner, so they moved away, but she would have enrolled at Wechsler this year. We had three others but their parents were Navy people and so they were moved away. But I'm very sure that, in fact I think I could say I'm very sure, because the sentiment has already been expressed that some children are desirous of following a teacher [87] whom they had had in another school.

Q What reputation does your school bear in the community? A Well, it has rather a unique situation and of course the Black people feel that it is actually a contribution to Negro history. The school was established when the Meridian Separate Municipality was established. That's in 1888. And it came into being because of the fact that the school bond was to be floated and there was a Jewish Rabbi, Rabbi Wechsler, that name I'm sure is familiar to many educators, because I think it is his great-great-grandson who has done this Wechsler-Bennet test, but he was the Jewish Rabbi at that time. And as I understand it, as the history goes, that he stated to the school board that if they did not include a brick building for Negroes that he would canvas against the bond. And so this building was included. It's the first brick building in the state of Mississippi for the education of Negroes. Rabbi Wechsler, as the story goes, gave a thousand dollars of his own money in 1888 for the construction of this building. So, it was thus named. That is a Jewish name. And of course it has quite a sentiment there in this city, not only from

the standpoint of the Black people but also from the standpoint of the Jewish people.

Q You are really quite modest. Does your school not hold [88] and bear the greatest and highest of reputations in the city of Meridian? A Well, perhaps maybe that is true. But perhaps it is because of the program which goes on there. It may be that perhaps maybe if it had been written up, it might have some of the reputation as the schools which Sam Shepherd has done there in St. Louis. But we have realized that American Education is middle-classed. But we also realize that education emanates from the culture. And so these people have studied and they have been concerned about developing a school program which specifically meets the needs of the people in this community totally as a whole individual, intellectually, socially, mentally, and even so far as that's concerned, economically.

Q As an example, would you cite several for the Judge of programs that are being conducted in your school. A Well, we have special programs beginning with the parents, because a part of our philosophy is that we know that the parents are the hubs around which the school must run. And as I said before, schools are developed from culture and this means understanding the mores and the beliefs and those types of things as universal within a community. So we have a program which is geared specifically that parents might also be able to study and learn those [89] alternatives which they feel would be the best to change the education which likewise would change the behavior of their children and the community at large. So we have an adult education program which goes two nights a week, on Mondays and Tuesdays. This involves all the members of the family. We have the library open that the children may get their lesson and also that parents may use it for reading. It is open for the community at large to come in. Clubs may come in and hold their meetings in the library or in the reading room which we have set up to serve the community. In fact, the school is one of these that you might term as a community school. There are different types of schools, child centered, subject centered, but ours is basically community, and along with

that, child centered. Then we have a special program to meet children's needs. Our school is organized as a city. This is done specifically in order to teach the children how government is run. The corridors are all named as streets and avenues. Just yesterday, they had the election of the school mayor. Last week, they had the mayor out to explain what his duties were. We have a program going on now as experiment—

BY THE COURT: You want to be heard, counsel?

BY THE WITNESS: Pardon?

[90] BY MR. ANDERSON: I have an objection, Your Honor, that the narrative is irrelevant here, Your Honor.

BY THE COURT: Well, I believe I'm going to sustain it. It may be inclined to show whether or why the Colored people haven't left there to go to some of the White schools, but I think we've heard enough there. All right; let's go to something else.

(THE COURT CONTINUES:), I don't like to cut your speech short, though, because you are making a good speech.

BY THE COURT: I think so, too, but we have to move along.

BY THE WITNESS: Thank you.

MR. COMPTON CONTINUES:

Q Mrs. Crump, do you have a program in your school dealing with fatherless boys. And if so, tell the Court what it is, briefly. A Yes, we have a special program.

BY THE COURT: What's the relevancy of it?

BY MR. COMPTON: The relevancy of it, Your Honor, is to show to the Court a number of things. First, that this system is trying to meet the needs, the educational needs of the entire community. This happens to be one facet of it. Number two, it goes to show good faith from the part of this community and number three, that there's more to education than just mixing. And number [91] four, that we have seized the medal that Judge Wisdom keeps talking about, and we're trying to educate all the children in the community without regard to race. And

these people happen to be Black, they happen to have a special need and we're trying to meet that need.

BY THE COURT: I'll let her briefly state it.

BY THE WITNESS: Well, in brief, Judge, we know that this whole thing that we're having in education is based upon the culturally deprived and the educationally disadvantaged. And one of these, as all research says, is the lack of self image, and particularly of the male image. We are not trying to deny this. We're simply taking our people where they are and trying to move them in a direction which really OEO has made all these studies about.

BY THE COURT: Let me ask you this. You say that your freedom of choice has been working effectively in the Meridian Schools?

BY THE WITNESS: Yes, I think so, Judge.

BY THE COURT: Do you know of any other plan or program which would work more effectively and more quickly to desegregate the schools if they need desegregating without doing violence to the educational system?

BY THE WITNESS: Well, I have thought quite a bit about this pairing and zoning. I have much information because of [92] the fact that I have been in, I should think every state in the Union and I see many cities with it. Of course, I do not know enough about either one of them to say just exactly what would happen because I have no idea about what the zones would be nor what the pairs would be. I have seen situations where they took perhaps maybe one third grade class from a school and its teacher and sent it over to another school, a Negro school, and the Negro school sent the third grade teacher and its whole class over there. Of course, either one, Judge, I have no idea that it would cause any kind of real unusual confusion in the community of Meridian.

BY THE COURT: My question was that whether or not you know of any other plan that would be more effective than the freedom of choice without doing violence to the educational system itself.

BY THE WITNESS: I can't truthfully say that I do, because I don't know enough about the others. But I don't believe that I know of another one.

BY THE COURT: Have you been in Washington or New York or Chicago lately to see how their plans are working? You say you have been in all the states.

BY THE WITNESS: Yes, I have, and of course, well, I've been in all of them and the situations into which I went I found [93] that it, they had really carried them back further than when they began. I have a brother-in-law who teaches in Akron, Ohio. He's been there for seventeen years—oh, no, longer than that. About nineteen—and when he first started teaching in South High in Akron, I guess it was about 95% White, and I've kept up with the annuals and last year I got his and now it's I guess about perhaps maybe 93 Black.

BY THE COURT: It changed from 95 White to 93 Black?

BY THE WITNESS: That's right. That's right. And the annuals will even prove it, to show. But, of course, he does, too. Of course, in this case, they moved out.

BY THE COURT: Who moved out?

BY THE WITNESS: The people moved out from this particular community.

BY THE COURT: The Whites moved out?

BY THE WITNESS: Yes, the Whites moved out, and they moved further out from this community in Akron.

BY THE COURT: The same thing happened in Washington?

BY THE WITNESS: Yes, same thing happened in New York. Of course, the Bedford-Styvverson situation perhaps maybe is a little bit different, but it also goes back to your how the whole turn of the tide will be, and this probably might come about in the Black Revolution. You may see [94] this in Meridian, that this might come along. The Black people will finally want all Black teachers.

BY THE COURT: According to television they had a revolution in Chicago this morning.

BY THE WITNESS: Yes. Of course, they have them in Chicago every day.

BY THE COURT: I see. That's just in the model schools, though.

BY THE WITNESS: Pardon?

BY THE COURT: They just have that trouble where they have these model schools as I understand it.

BY THE WITNESS: In Chicago?

BY THE COURT: In Chicago and Washington.

BY THE WITNESS: Well, possibly so. I don't know too much about that. That might be just an opinion. Because I have relatives and friends and many of them I don't think would concur with that, and I don't know that much about it, to make such an opinion of statement about it like that.

MR. COMPTON CONTINUES:

Q. Mrs. Crump, you stated you've been with the Meridian system for thirty years. State what changes, if any, have been made since 1954, in the city school system with reference to whether it's dual or non-unitary. A. Well, of course, that's self-evident. In 1954, we know [95] that we had a dual system and I don't know whether this is irrelevant or not, but I think that's one of the reasons why I stayed in Meridian, because of the fact that I felt that it needed to, if it didn't do this on its own integrity that it would need to do it. I felt that this was this type of community. But in 1954, you know that we had this dual system of education. But so far as I'm concerned now, and my interpretation to the community is that we have a unitary system, and if any of our parents make reference to a White or Negro school, I say "No, we don't have such now. We have the Meridian Separate School District. We just have schools".

Q. Have you participated personally in mixed faculty, principal, and other professional meetings within the Separate School District? A. Well, it interests me greatly about the word mixed, because I think of how that I mix a cake, but we do have integrated faculty meetings. We've had integrated principals' meetings I guess for about twelve years. But not any of our professional meetings are anything but integrated. All of our teachers meetings are integrated. All of our principals meetings are integrated. In fact, all of our staff meetings are integrated.

Q. Does the school board ever visit your school? [96] A. Yes, the school board visits our school very often. Of course, sometimes I think perhaps maybe that we have become somewhat of a show place. But they visit it very often.

Q. And what do they do when they come into your building? A. Well, they come in as visitors and they come in also as persons who are a member of this particular family. They visit every classroom. They visit every facet of our program. They eat lunch, not with me, but they eat lunch with the children, and the teachers.

Q. The school board eats lunch in the cafeteria with the faculty and the children? A. Yes. The school board eats lunch in the cafeteria with the faculty and with the children. They sit at different tables and eat with the children and pursue conversations with the children about their school program and whatever they so desire.

Q. When was the last time the board was in your building? A. I believe it was about two weeks ago that the school board visited with us.

Q. Do you have an opinion as to whether freedom of choice is better for the Meridian Municipal Separate School District than any other plan that you know of?

BY MR. ANDERSON: Objection, Your Honor. That calls for a legal conclusion.

[97] BY THE COURT: I believe I'll let her answer. She's pretty experienced, I think.

A. Well, I personally—you asked for an opinion—and I personally think that at this time that this freedom of choice is working well, and I think that it will work even better; because, as I said before, I think that the community of Meridian has accepted this and I think that they are really more interested in good education and good teachers than they are Black and White.

Q. Are you familiar with the—

BY THE COURT: Excuse me just a minute. What was the last thing you said, whether they're Black or White?

A. I said I think that they are really more interested in a good educational program and professional prepared teachers than they are the matter of Black and White.

BY THE COURT: All right.

Q. Are you familiar with the attitude of the community as a whole, both Black and White, on the matter of race in Meridian? A. Yes, generally and specifically, too. Because, well, the first place, I'm very active in Church Circles and United Church Women, and I come in contact with, as I said, all facets of the community, both Black and White, and I think that their attitudes becoming those that they would [98] be proud of themselves.

Q. Would you state to the Court whether or not as a fact or not, there is presently good race relations between the Whites and the Blacks in Meridian. A. Well, yes, there is good relationships between the Whites and Blacks because it has been a procedural process, and it has been one of these things that just didn't happen. They were brought about. And it's to the point now that it will be, because as I have said before, the Negro in Meridian has become a thinking person. Those who are involved in Civil Rights and this kind of thing, and I think that they are going to demand this two way communication, that this is going to be.

Q. Have there been any riots or civil commotion between the races in Meridian, to your knowledge? A. Well, now, do you mean now, of—

Q. Street riots, yes. Anything of this sort with regard to this integration, desegregation of schools. A. No. Not that I know of.

Q. Tell the Court what you think the future holds for freedom of choice in Meridian, Mississippi, based upon your knowledge of the community, your experience, and your professional qualifications. A. Well, as I previously said, I think that the people in [99] Meridian are seriously considering this, and I don't think that the people in Meridian want any trouble. Now, they perhaps may be a little bit opinionated and they probably want to have maybe the world to see them in a light, and I think that they have integrity enough to preserve this. This is an

honest appraisal, and I don't think they want it for their own community if they can avoid it.

Q. Do you predict further faculty integration in Meridian? A. Pardon?

Q. Do you predict further faculty integration in the future in Meridian? A. Yes, I predict further faculty integration in Meridian, and I think it's possibly going to be faster than maybe what Mr. Vincent assesses it to be. I think this particularly in regard to the Negro teachers.

Q. Do you predict further student integration in Meridian? A. Yes, I predict that and I predict that there will be more, rather, there will be some students coming into Negro schools. I believe here, come the '69 session.

Q. That's all, Your Honor.

BY THE COURT: Is it your belief that the more integration of the faculty will assist in the integration of the students?

BY THE WITNESS: Excuse me, sir?

[100] BY THE COURT: Is it your opinion, or your belief that more White teachers into the previously all Colored schools will assist in better relationships?

BY THE WITNESS: Yes, Your Honor, I think so, and I think that this is going to also help the integration of the White children coming into the Negro schools.

BY THE COURT: All right. How about Colored teachers going into the White schools? Do you think that some of the students will follow them, the more that they go into the White schools?

BY THE WITNESS: I think perhaps that may be true, too, Your Honor, because I think that this is a two way process. And, of course, what we are having to come to understand in educational circles as well as in our society, that I think it is about, well our population, most of our population is under twenty-five, and we're dealing entirely with a new child, and children are concerned more about values than we give them credit for. So children are really looking for where the action is. They're not concerned about the color of the person, and, even in elementary school, they are hunting for teachers who know what they're doing.

BY THE WITNESS: Well, I'm in favor of the plan as it is now working as has been proposed. What I had hoped to say was that a result of my studies I had found more and not less segregation in Pittsburg than when I went there. If you define segregation by the number of Negro students attending schools which are predominently Negro, the number is gaining rapidly in Chicago and gaining in Pittsburg, gaining in St. Louis. Most of it has to do with the residential; most of it has to do with the influx of people in the communities. But the initial impact of this thing that I wrote was that only in the South is desegregation taking place, and that the large cities in America I think anybody that knows anything about it admits that. Mightily they've striven to get more desegregation, get away from the fact, though they have not succeeded.

BY THE COURT: Aside from making any comparisons with somebody else, what is your opinion as to whether or not reasonable [T-255] progress from a schoolman's view point, now, because we don't have any schoolman, I think on the Court of Appeals, of any kind of United States Court of Appeals. So, I'd like to know what your opinion is.

BY THE WITNESS: Well, I think it is a substantial compliance which I would favor. I think it is working. I think it's a reasonable plan. I like the fact that it's voluntary. I like the fact that the Negroes are selecting, are going into schools that were previously White. I think there's a chance of building up an enate respect between White and Negroes, when some of your better Negro students are transferred, or do transfer into the school with Whites. If I—I guess it's not pertinent.

* * *

[T-270] Q. In other words, you contemplate then, in the final analysis, the complete elimination of the dual school system? A. Oh, well, yes. Yes, the elimination of a dual system is entirely different in my feeling from elimination of Negroes going to predominently Negro schools and Whites going to predominently White schools.

Q. You say those are the same? A. They are different. You have presumably unitary systems in the North

and elimination of the dual system, but you do not have the other thing that you're talking about.

Q. Let's talk about Hinds County. A. All right.

Q. You've heard the testimony and are somewhat familiar with the facts here. In your opinion, has the dual school system been eliminated in Hinds County? A. Well, I would say that the approach to the elimination of a dual system certainly has been made.

Q. Has been begun? A. Has been begun, yes. At what precise moment you say now we are not a dual system, I wouldn't have enough expertness to testify on that.

* * *

[T-292] BY THE WITNESS: I was saying the most important thing is not really what organizational arrangement is being made, but rather who does carry out the arrangement. That is, if you have a Superintendent, Principals, and teachers who are highly hostile to the mingling of races, that would have a major impact on the children whatever plan you choose. If you have a Superintendent, Principals, and teachers, along with parents, who are favorable at least to give the children a free choice and allow them to develop by themselves, then I think the result would be the less pressures exercised, the more favorable it would be.

[T-293] Q. Now, would it increase as age goes up, the number of children who would select other associations? A. I would think so, yes. In particular this area, since we speak of this area, as the children grow older, probably the influence of the home which might very well be, according to the customs of this area, in favor of segregated living, that influence will pale and the children will rely more on themselves and they will be more interested in playing football with a boy who plays football well regardless of his color.

Q. Now, would the result be the same under an involuntary system where no free group association were permitted? A. You are now speaking of results in terms of association?

Q. In terms of association. A. Well, there have been on this a number of studies and I have a little experience myself. I would say that the result of an involuntary system will be resentment on all sides. Resentment both on the part of the Negroes and on the part of the Whites. In fact, I should think that the ultimate resentment on the part of Negroes may be greater even though they may originally have advocated precisely that system. I am speaking here from my own experience. What Negroes will resent is that they will be in association with people who they feel may be hostile [T-294] and resentful and may look down on them. One thing is to know that you are looked down upon in a general abstract way. Another thing is to be looked down upon every day by people with whom you're compelled to intimately associate. That is far more destructive and leads to far more resentment. There will be resentment if the achievement, for whatever reason, is differential. Of course, there will be resentment of the better achievers by the less good achievers. But the main resentment, and this has come now to the fore is that Negroes will feel that their own self identity based on either punitive or actual belief in an African past and customs of their own in ways of their own, of thinking, which they feel is as good as that of Whites, that this identity, this historical past, is being destroyed by this association. At least this feeling is now being very strongly expressed in New York by Negro groups who wish, in effect, have schools entirely under their control with the purpose of being able to give Negro pupils a pride of their own, an idenfity of their own, by having them taught very largely in terms of Negro past, by having them learn some Swahili, by, and so on.

BY MR. LIVINGSTON: Objection.

BY THE COURT: Yes, I sustain the objection. Go to something else now.

[T-295] Q. What are the educational effects of voluntary against involuntary group association? A. The point is that in voluntary associations the identity of each group is preserved, and each group feels that remaining identical and keeping the self image of which they are proud they are

establishing friendly relations with members of other groups. In involuntary association, one or both groups feel that they are robbed of their identity and in the weaker groups this is certainly true. In the stronger group it may not be true, but the feeling may still be there, and there will be mutual resentment.

Q. In your opinion, what would be the effect on educational achievement? A. I have to base myself here on studies made by others. I'll say this very simply, that in psychological terms, educational achievement particularly in the lower grades very largely is determined by the motivation of the child. Or to put it more strictly, given the capacities and motivations decisive. Assuming then that there is the capacity, if the first integration leads, as I believe it will, to resentment of the whole situation, this would be impairing as a motivation particularly of the groups that to begin with entered with a somewhat lower achievement. And the result would be that this achievement would be [T-296] further lowered. However, I do wish to qualify this. If the—well, you asked about forced integration, so I was going to qualify then the phase then the integration is not forced if it occurs with a consensus and these consequences need not occur.

* * *

[T-368] BY THE COURT: In your opinion, based on your training, Doctor, how would enforced integration at this time, the immediate, total integration of schools affect the Negroes of this country in view of this trend toward more self-identity?

THE WITNESS: It will lead, I think, to even greater demoralization than is already taking place, and it [T-369] will also lead to lower educational achievement.

* * *

STIPULATION

It is agreed by and between the parties hereto that the following stipulation may be introduced at the hearing of plaintiff's Motion for Supplemental Relief now set for hearing before the United States District Court for the Southern District of Mississippi, Jackson Division, on October 7, 1968, said stipulation being as follows:

1. That the Attorney General of the United States of America has not received any complaint from any parent or any pupil residing in the geographical area of the Hinds County School District or from anyone attending any of the schools in the Hinds County School District concerning or in any way pertaining to the operation of the present "desegregation plan" as now in effect in said Hinds County School District, and the present pending motion, hereinabove referenced, is not predicated upon or based upon any written complaints received from any such pupils or their parents.

2. That insofar as the operation of said freedom of choice plan now in effect in said Hinds County School District is concerned, the pupils and parents in said district have been free from any overt coercion, intimidation or interference from any parties in any way connected with the school system or from anyone else in connection with the school to which they make application to attend.

THIS DONE, this 25th day of September, 1968.

/s/ Robert C. Cannada
Attorney
Hinds County Board of Education

/s/ Gene Livingston
Attorney
Department of Justice

ORDER FOR CONSOLIDATION WITH UNITED STATES OF AMERICA v. HINDS COUNTY SCHOOL BOARD, ET ALS., CIVIL ACTION No. 4075, JACKSON DIVISION

Certain of the above styled causes came on to be heard on motion of defendants for the consolidation thereof (to the extent set forth in this order) with the *United States of America* v. *Hinds County School Board, et als.*, Civil Action No. 4075, Jackson Division, and the Court being of the opinion that the remainder of said causes should likewise be consolidated, the Court finds that:

1. The motions for supplemental relief pending in all of these actions involve common questions of law but the application thereof to each school district will differ. That much of the evidence upon the basic issue of effectiveness of desegregation plans is common to all districts which are parties defendant. A consolidation for the hearing of such motions for supplemental relief upon such common questions of fact and law will avoid unnecessary costs and delay and is authorized by Rule 42(a) of the Federal Rules of Civil Procedure.

2. Evidence upon such motions for supplemental relief as to the conditions within a given district, including good faith and the result of desegregation plans within each district and the application of the rules of law thereto, will present issues of law and fact which should be heard separately.

It is therefore ordered that all of the above styled causes are consolidated with *United States of America* v. *Hinds County School Board, et als.*, Civil Action No. 4075, Jackson Division, for the hearing of all of the motions for supplemental relief now pending. That the record made

in Civil Action No. 4075 upon such pending motion shall become a part of the record in all of the above styled causes without the necessity of a reproduction thereof, and will be considered to have been introduced herein at the separate hearings to be had upon the issues of law and fact not common to all actions.

ORDERED this the 19th day of August, 1968.

/s/ William Harold Cox
United States District Judge

MOTION FILED OCT 7 1969 SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 632

BEATRICE ALEXANDER, *et al.*,
Petitioners,

v.

HOLMES COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE MEMORANDUM AMICUS CURIAE AND FOR IMMEDIATE CONSIDERATION THEREOF AND MEMORANDUM AMICUS CURIAE FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

JOHN W. DOUGLAS
GEORGE N. LINDSAY
Co-chairmen
BETHUEL M. WEBSTER
CYRUS R. VANCE
ASA SOKOLOW
JOHN SCHAFER
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Of Counsel:
TIMOTHY B. DYK
MICHAEL R. KLEIN
DEANNE C. SIEMER

October 7, 1969

IN THE

Supreme Court of the United States

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MOTION FOR LEAVE TO FILE MEMORANDUM AMICUS CURIAE AND FOR IMMEDIATE CONSIDERATION THEREOF

The Lawyers' Committee for Civil Rights Under Law hereby respectfully moves for leave to file the attached Memorandum Amicus Curiae in the above-entitled case. Petitioners have consented to the filing of this memorandum. Respondent United States of America (a plaintiff below) has also consented. Consents have been requested from the respondents who are defendants below in the fourteen cases, but as yet consents from these respondents have not been received.

Since the responses in this case are due to be filed this Wednesday, October 8, 1969, and since this Court may consider this case at this week's Conference, this motion and the attached Memorandum Amicus Curiae cannot be considered by the Court if the non-consenting respondents are afforded time to respond to this motion under Rule 35(4). Moreover, we believe that their positions on the merits may be adequately presented in their responses to the petition for certiorari. Accordingly, applicant respect-

fully requests that this motion and the attached Memorandum Amicus Curiae be considered together with the petition for certiorari and the responses to the petition, and that, pursuant to Rule 35(4), consideration of this motion and the attached Memorandum Amicus Curiae not be postponed pending receipt of papers in opposition from the non-consenting respondents.

Applicant respectfully submits that the attached Memorandum Amicus Curiae will be of assistance to this Court. The reasons that applicant believes its motion should be granted are as follows:

The Lawyers' Committee for Civil Rights Under Law was organized on June 21, 1963, following a conference of lawyers at the White House called by President John F. Kennedy. The formal organization of the Lawyers' Committee for Civil Rights Under Law is that of a non-profit private corporation whose principal purpose is to involve private lawyers throughout the country in the struggle to assure all citizens their civil rights. The membership of the Committee includes eleven past presidents of the American Bar Association and two former Attorneys General.

Since 1964, the Committee has operated a law office in Jackson, Mississippi, which has handled more than 2,000 civil rights cases. Over 150 attorneys from all parts of the United States have served as unpaid volunteers in the Jackson office in aid of the permanent staff there. The Committee's national and local offices have actively engaged the services of the private bar in addressing a range of legal problems in such areas as education, housing, employment, economic development, and the administration of justice. In the field of education, both the national staff and the local committees have undertaken well over a score of projects to promote quality education and to assure its availability to all citizens, regardless of income level or race. The Committee has recently renewed its offer to assist the Department of Justice in carrying out national objectives in the civil rights area.

In the two weeks which have passed since the filing of the petition for certiorari, federal officials charged with enforcement responsibilities in this field have placed in question the capacity of the federal government to enforce an order for immediate desegregation. The Lawyers' Committee for Civil Rights Under Law, in the attached memorandum, deals directly with this most relevant issue which is not presented in the petition for certiorari. Moreover, applicant deals with an additional question—not fully treated in the petition—whether community opposition is an adequate ground for delay in enforcement.

Accordingly, the Committee respectfully requests that this Court grant leave to file the attached Memorandum Amicus Curiae, and consider this motion and the Memorandum together with the petition and responses.

Respectfully submitted,

JOHN W. DOUGLAS

GEORGE N. LINDSAY
Co-Chairmen

BETHUEL M. WEBSTER
CYRUS R. VANCE
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October 7, 1969

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM AMICUS CURIAE FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

QUESTION PRESENTED

Whether, fifteen years after this Court's decision in *Brown* v. *Board of Education*, enforcement of elementary school desegregation in the State of Mississippi should be further delayed.

INTEREST OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

The Lawyers' Committee for Civil Rights Under Law was organized on June 21, 1963, following a conference of lawyers at the White House called by President John F. Kennedy. The formal organization of the Lawyers' Committee for Civil Rights Under Law is that of a non-profit private corporation whose principal purpose is to involve private lawyers throughout the country in the struggle to assure all citizens of their civil rights. The membership of the Committee includes eleven past presidents of the American Bar Association and two former Attorneys General.

Since 1964, the Committee has operated a law office in Jackson, Mississippi, which handled more than 2,000 civil

rights cases. Over 150 attorneys from all parts of the United States have served as unpaid volunteers in the Jackson office in aid of the permanent staff there. The Committee's national and local offices have actively engaged the services of the private bar in addressing a range of legal problems in such areas as education, housing, employment, economic development, and the administration of justice. In the field of education, both the national staff and the local committees have undertaken well over a score of projects to promote quality education and to assure its availability to all citizens, regardless of income level or race. The Committee has recently renewed its offer to assist the Department of Justice in carrying out national objectives in the civil rights area.

REASONS FOR GRANTING THE WRIT

The Time for Additional Delay in School Desegregation Is At An End.

This is not the first time elements of the school system of the State of Mississippi have appeared before the federal courts in matters of school segregation. In the fifteen years since the first *Brown* decision, 347 U. S. 483 (1954), at least fourteen decisions involving Mississippi school segregation have been rendered by federal courts.[1] Nearly all

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[1] *United States* v. *Indianola Municipal Separate School Dist.*, 410 F. 2d 626 (5th Cir. 1969); *Anthony* v. *Marshall County Bd. of Educ.*, 409 F. 2d 1287 (5th Cir. 1969); *Henry* v. *Clarksdale Municipal Separate School Dist.*, 409 F. 2d 682 (5th Cir. 1969); *United States* v. *Greenwood Municipal Separate School Dist.*, 406 F. 2d 1086 (5th Cir. 1969); *Adams* v. *Mathews*, 403 F. 2d 181 (5th Cir. 1968); *United States* v. *Hinds County School Bd.*, 402 F. 2d 926 (5th Cir. 1968); *Singleton* v. *Jackson Municipal Separate School Dist.*, 348 F. 2d 729 (5th Cir. 1965); *United States* v. *Madison County Bd. of Educ.*, 326 F. 2d 237 (5th Cir.), *cert. denied*, 379 U. S. 929 (1964); *Meredith* v. *Fair*, 313 F. 2d 532 (5th Cir. 1962), *cert. denied*, 372 U. S. 916 (1963); *Meredith* v. *Fair*, 313 F. 2d 534 (5th Cir. 1962); *Coffey* v. *State Educational Finance Comm'n*, 296 F. Supp. 1389 (S. D. Miss. 1969); *Franklin* v. *Quitman County Bd. of Educ.*, 288 F. Supp. 509 (N. D. Miss. 1968); *United States* v. *Natchez Special Municipal Separate School Dist.*, 267 F. Supp. 614 (S. D. Miss. 1966); *United States* v. *Biloxi Municipal School Dist.*, 219 F. Supp. 691 (S. D. Miss. 1963), *aff'd*, 326 F. 2d 237 (5th Cir.), *cert. denied*, 379 U. S. 929 (1964).

have issued the same unmistakable declarations: Segregation must end, good faith compliance with this Court's decision in *Brown*—which as an interpretation of the Fourteenth Amendment is "the supreme law of the land"[2]—is constitutionally required.

As the record painfully reveals, however, good faith compliance has not been forthcoming. Five thousand six hundred and ~~eighty~~ twenty-two days have passed since this Court's landmark decision in 1954. For those fifteen years the school systems in Mississippi have failed to effect good faith compliance. If one lesson has been learned during these past fifteen years, it is that the ingenuity of the officials of the Mississippi school system should not be underestimated. Now, on the eve of the first meaningful elementary school desegregation in the State's history, the defendants have apparently succeeded in convincing the Secretary of Health, Education and Welfare, who in turn, has convinced the District Court, that further delay should be afforded because:

> "The administrative and logistical difficulties which must be encountered and met in the terribly short space of time remaining must surely . . . produce chaos, confusion and catastrophic educational setback. . . ."[3]

The ring is familiar if the source is not.

The Secretary's reference is to the defendant's assertion that the petitioners' constitutional rights must await (1) the redrawing of bus routes, (2) the reassignment of teachers, (3) the conversion of classrooms and (4) a pro-

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[2]*Cooper* v. *Aaron*, 358 U. S. 1, 18 (1958).

[3]Letter of Secretary Finch to the Court of Appeals and the judges of the District Court. Transcript of Record in the Court of Appeals, Vol. IV, Document No. YY, Exhibit 2.

gram of preparation of the teachers and students involved.[4] This fourth ground appears to be a euphemism for overcoming community resistance.

The supposed administrative and logistical difficulties asserted in support of the request for a further delay are wholly inadequate, particularly in the light of the long delay already encountered.[5] There is nothing in the record to demonstrate that the redrawing of bus routes could take more than a few days. Even assuming that the second and third reasons (reassignment of teachers and the conversion of classrooms) will involve difficulties of substance for the school boards involved, it is scarcely credible that they outweigh the long overdue promise of equality or that these supposed difficulties cannot be adequately resolved after desegregation has been achieved.

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[4]Findings of Fact and Conclusions of Law of the District Court (Aug. 26, 1969), as reproduced by Petitioners in Appendix D at p. 65a of their Petition for Writ of Certiorari.

[5]As this Court noted in *Watson* v. *Memphis*, 373 U. S. 526, 529-30 (1963), in ordering immediate desegregation of the Memphis city parks:

> "In considering the appropriateness of the equitable decree entered below inviting a plan calling for an even longer delay in effecting desegregation, we cannot ignore the passage of a substantial period of time since the original declaration of the manifest unconstitutionality of racial practices such as are here challenged, the repeated and numerous decisions giving notice of such illegality, and the many intervening opportunities heretofore available to attain the equality of treatment which the Fourteenth Amendment commands the States to achieve. These factors must inevitably and substantially temper the present import of such broad policy considerations as may have underlain, even in part, the form of decree ultimately framed in the *Brown* case. Given the extended time which has elapsed, it is far from clear that the mandate of the second *Brown* decision requiring that desegregation proceed with 'all deliberate speed' would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient. *Brown* never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools. . . ."

Recent statements on behalf of the Department of Justice, if accurately reported,[6] would suggest that the request of the United States for additional delay, which was convincing to the District Court, is based, in significant part, upon the fourth ground—community resistance—and upon an asserted lack of adequate manpower in the Civil Rights Division to enforce immediate desegregation. The Department's reliance on these factors is, in our view, unwarranted since neither of these arguments is sufficient or even cognizable by the courts.

1. This Court Has Specifically Held That Desegregation Must Not Be Delayed Because of Community Resistance.

From the beginning of the battle for equality of educational opportunity this Court has made it clear that community resistance is not an accepted basis for delay. As early as 1917 this Court in *Buchanan* v. *Warley,* 245 U. S. 60, 81, invalidating a zoning ordinance enforcing separation of the races, held that the avoidance of "race conflicts" was not an adequate reason for continued segregation. In the second *Brown* decision itself, 349 U. S. 294, 300 (1955), this Court declared:

> "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

Three years later, when faced with the spectre of coordinated state resistance to the enforcement of desegrega-

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[6] "Nixon Aide Warns Quick Integration Can't Be Enforced," *The New York Times,* p. 1, col. 3 (Sept. 30, 1969); "Leonard Defends U. S. School Policy," *The New York Times,* p. 25, col. 1 (Oct. 3, 1969). (The full text of these articles is set forth as Appendix A to this Memorandum.) In a September 30, 1969, statement the Department conceded that, if the Supreme Court reversed the decision below, the Department would enforce the order entered pursuant to the Supreme Court's mandate.

tion, the decision in *Cooper* v. *Aaron*, 358 U. S. 1 (1958), was no less emphatic. Specifically rejected there was the very concept upon which respondents' contentions are, in large part, premised: the capacity of opposition to create practical difficulties in enforcement, and then to successfully offer those difficulties as proof of the prematurity of a decree to desegregate now.[7]

2. The Alleged Inadequacy of the Enforcement Resources of the United States Department of Justice Is No Ground for Further Delay.

As we have noted, the United States Department of Justice has publicly suggested that delay is in order because the Department lacks adequate resources to enforce immediate desegregation. But "it is an 'inadmissible suggestion' that action might be taken in disregard of a judicial determination." *Powell* v. *McCormack*, 395 U. S. 486, 549 n. 86 (1969).

> "[T]he Attorney General of the United States, has a constitutional obligation to eliminate racial discrimination. . . . Failure on the part of any of these Government officials to take legal action in the event that racial discrimination does exist . . . would constitute dereliction of official duty." *United States* v. *Frazer*, 297 F. Supp. 319, 323 (M.D. Ala. 1968).

Moreover, the Department's contentions are without factual foundation. The Department has great flexibility in allocating resources. If, at any given time, there is an insufficient number of attorneys in the Civil Rights Division, the Attorney General may delegate civil rights functions to attorneys from other divisions within the

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[7] See also *Watson* v. *Memphis*, 373 U. S. 526, 535-37 (1963); *Wright* v. *Georgia*, 373 U. S. 284, 293 (1963); *Taylor* v. *Louisiana*, 370 U. S. 154 (1962); *Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Brown* v. *Board of Educ.*, 349 U. S. 294, 300 (1955).

Department. 28 U. S. C. § 510 (Supp. III 1965-67). Should there be insufficient manpower within the Department, the Attorney General is authorized to specialiy appoint any attorney to assist him in any proceedings, civil or criminal, whether or not the attorney is a resident of the district in which the proceeding is brought. 28 U. S. C. § 515 (Supp. III 1965-67). The Lawyers' Committee stands ready to assist in the recruitment of the services of as many volunteer attorneys as may be needed by the Department for the purpose of enforcement of desegregation orders in these and other cases.[8]

[8]The Lawyers' Committee volunteers would offer their services without compensation, but token payment is required by statute. 31 U. S. C. § 665(b) (1964).

CONCLUSION

Certiorari should be granted; the order of the Court of Appeals of August 28, 1969, should be summarily reversed; the order of the Court of Appeals of July 3, 1969, should be reinstated; and the case remanded for immediate appropriate action in order that desegregation may be immediately effected.

Respectfully submitted,

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GEORGE N. LINDSAY
Co-chairmen
BETHUEL M. WEBSTER
CYRUS R. VANCE
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October 7, 1969

APPENDIX A

The New York Times, September 30, 1969

NIXON AIDE WARNS QUICK INTEGRATION CAN'T BE ENFORCED

Rights Chief Says "Nothing Would Change" If Court Told South to Act Now

By FRED P. GRAHAM, Special to The New York Times

WASHINGTON, Sept. 29—The chief of the Justice Department's Civil Rights Division said today that if the Supreme Court should rule in a pending case that schools must integrate immediately throughout the South the order could not be enforced.

Referring to an appeal that the Court has already agreed to consider on an accelerated schedule, Jerris Leonard, an Assistant Attorney General, declared that "if the Court were to order instant integration nothing would change. Somebody would have to enforce that order."

"There just are not enough bodies and people" in the Civil Rights Division "to enforce that kind of a decision," Mr. Leonard said at a news conference.

Appeal in Mississippi

The N.A.A.C.P. Legal Defense and Educational Fund Inc. has asked the Supreme Court to discard its "all deliberate speed" formula for school desegregation and to demand immediate abolition of racially identifiable schools across the South.

The request was made in an appeal of a desegregation delay that was granted to 30 Mississippi school districts at the behest of the Nixon Administration.

Mr. Leonard's remarks raised the possibility that the Supreme Court could find itself, for the first time since it declared public school segregation unconstitutional in 1954, in the position of issuing a school desegregation order without full expectation that it could or would be enforced by the executive branch.

Mr. Leonard called the news conference to respond to a group of dissident lawyers on his staff who have protested that the Nixon Administration has softened civil rights enforcement.

The dissident group released today the text of a statement of protest that they delivered last month to Mr. Leonard, Attorney General John N. Mitchell and President Nixon.

The statement charged that the Government's action in granting the Mississippi desegregation delay indicated "a disposition on the part of responsible officials of the Federal Government to subordinate clearly defined legal requirements to nonlegal considerations when formulating the enforcement policies of this division."

The lawyers charged that by basing civil rights decisions on "other considerations" than the law, the Administration "will seriously impair the ability of the Civil Rights Division, and ultimately the judiciary, to attend to the faithful execution of the Federal civil rights statutes."

The statement reportedly bore the signatures of 65 of the 74 nonsupervisory "line" attorneys in the Civil Rights Division.

Seeks Court Compliance

Attorney General Mitchell was asked about the statement today at a news conference in Miami, where he is attending the meeting of the International Association of Chiefs of Police.

He denied published reports that one of the "other considerations" that prompted the delay was a hint by Senator John C. Stennis of Mississippi that he would not give the Administration's antiballistics missile project his full support unless the delay were granted.

"That is completely false," Mr. Mitchell said. He added that "the objective of the Justice Department is to comply with the Court decision and statutory requirements."

Mr. Mitchell said he did not "presume that there would be any need to take action" against the dissident lawyers. Mr. Leonard said he had not been embarrassed by the ferment within his division and said he was confident that the line attorneys would cease their protests now that the Government's policy has been clarified.

Sources within the dissident group said that their statement was released today after having been kept secret for a month because the group believed that Mr. Leonard had not given assurances that the Justice Department would push school desegregation vigorously. But the lawyers said they did not know what further protest action, if any, their group would take.

Request by Finch

Mr. Leonard stressed repeatedly throughout his 45-minute news conference that the threat of school boycotts and school-closings by diehard whites in the South could retard the pace of school desegregation. The dissident attorneys have charged that this official attitude could encourage Southern whites to defy the law.

Mr. Leonard disclosed that Robert H. Finch, Secretary of Health, Education and Welfare, asked the Federal judges who had jurisdiction over the Mississippi case for the delay last month without first consulting Mr. Leonard, who had ultimate responsibility for the handling of the case.

But Mr. Leonard agreed with Mr. Finch's opinion that the time was too short to implement the desegregation plans in the few days that remained before the start of the school year. The judges granted the delay, which would put off major integration moves in the schools for at least a year.

If the delay had not been obtained, Mr. Leonard said, "I think we would have been faced with massive litigation efforts, school closings, and massive boycotting. It would have taken years and years to bring these districts back into line."

He predicted that with a year in which to lay the groundwork for desegregation, it will be accomplished smoothly in 1970.

In their appeal to the Supreme Court, the legal defense fund's lawyers contend that the possibility of delay has encouraged Southern school officials to make no plans for desegregation and then to plead at the last moment that there is inadequate time to prepare for desegregation without disrupting the schools.

The defense fund asked the Justices to give the appeal a speedy hearing and to order immediate desegregation of all Southern schools. The Court promptly announced that it will decide soon after the new Court term begins on Oct. 6 whether or not it will hear the appeal.

In the past, when the Court has agreed to accelerate its normal procedures, it has often developed that the justices were impressed with the contentions of the party seeking the speedy hearing.

The New York Times, October 3, 1969

LEONARD DEFENDS U. S. SCHOOL POLICY

Says Critics of Rights Stand 'Run Off at the Mouth'

WASHINGTON, Oct. 2 (AP)—Assistant Attorney General Jerris Leonard defended the Nixon Administration's school desegregation policy today, calling its critics "a lot of people who are frankly running off at the mouth."

Mr. Leonard, chief of the Justice Department's Civil Rights Division, also said he had no intention of quitting because of dissension among his lawyers over Administration policies.

His comments came at an impromptu news conference after Garry J. Greenberg, who resigned yesterday at the request of Mr. Leonard, said, he "would not and could not defend the Government's position."

Insisting that there had been no slowdown in school desegregation, Mr. Leonard said, "take the Mississippi situation out and give me one example where we have not vigorously enforced the civil rights laws."

In order to accomplish what some critics propose, Mr. Leonard said, "no one could make a statement that didn't advocate immediate, strict compliance with the law without regard to educational factors."

"I reject that 1,000 per cent," he said. "You cannot desegregate a school district that is presided over by recalcitrant school board members by simply issuing an edict."

Cites Times Editorial

Such a situation, he said, would put "school board members in the jail houses and kids in segregated schools."

Asked about statements by Federal judges who charged that a July policy statement was "a red herring across the path of progress toward desegregation," Mr. Leonard said, "I don't care if its judges, lawyers, legislators or whoever disagrees."

He took particular issue with The New York Times, saying an editorial yesterday was "picayunish and pusillanimous" and written by someone uninformed.

Asked about critical statements by the Commission on Civil Rights and some Congressmen, Mr. Leonard remarked, "I think you've got a lot of people who are frankly running off at the mouth who don't know what the facts are."

MOTION FILED

OCT 17 1969

IN THE

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OCTOBER TERM, 1969

No. 632

BEATRICE ALEXANDER, ET AL., *Petitioners*,

v.

HOLMES COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND FOR IMMEDIATE CONSIDERATION THEREOF AND BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

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Office of Education, *Equality of Educational Opportunity*

Progress Report on Civil Rights

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND FOR IMMEDIATE CONSIDERATION THEREOF

The National Education Association hereby moves, pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief amicus curiae in

the above-entitled cause. Petitioners and respondent United States of America have consented to the filing.[1] Consent has been denied by the respondent school boards. Because of the expedited schedule that has been established by the Court in this case, movant requests immediate consideration of this motion, without awaiting the receipt of written opposition by the respondent school boards, so that the attached brief may be considered along with the other briefs that will be filed before argument.

The National Education Association ("the Association") is an independent, voluntary organization of educators open to all professional teachers, supervisors and administrators. It presently has over one million regular members, and is the largest professional organization in the world. The Association was first organized in 1857 and was chartered by a special act of Congress in 1906. Its statutory purpose is

> . . . to elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States.

Overall policies of the Association are determined by its Representative Assembly, a body composed of approximately 7,000 delegates representing affiliated local and state education associations. The Association has long been committed to the principle that racial segregation in education adversely affects the quality of the education received by both black and white students. It has conducted detailed studies of the educational implications of the maintenance of

[1] The written consent of these parties has been filed with the Clerk.

dual segregated school systems. At its June, 1969 Convention, the Representative Assembly adopted a formal resolution urging adherence by the Federal government to the established timetable for complete desegregation of Southern school districts. The resolution instructed the officers and staff of the Association "to exert every effort to reestablish the September, 1969 deadline for full compliance."

It has long been settled that the complete disestablishment of formerly *de jure* segregated school systems is required under constitutional mandates. The issue before the Court in this case does not so much concern legal requirements, but rather educational reasons purportedly justifying a further delay in the implementation of those requirements. While movant fully supports the position of the petitioners that there are no acceptable reasons justifying further delay in school desegregation, it, as the principal association of educators in this country, is particularly well equipped to inform the Court as to the substance, or lack thereof, of the non-legal justifications for delay on which the court below, the Government and the respondent school boards have relied.[2]

Accordingly, the National Education Association respectfully requests that this Court grant leave to file the attached brief amicus curiae, without waiting for the receipt of papers in opposition, and that the Court

[2] The National Education Association and its state associations have participated as amicus curiae in other major proceedings involving issues of education and race. See *Smuck* v. *Hobson*, 408 F. 2d 175 (D.C. Cir. 1969); *Lee* v. *Macon County Board of Education*, 283 F. Supp. 194 (M.D. Ala. 1968).

consider said brief together with the briefs of the parties, and with the other papers in the case.

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October 17, 1969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 632

BEATRICE ALEXANDER, ET AL., *Petitioners,*

v.

HOLMES COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

I.

INTEREST OF THE NATIONAL EDUCATION ASSOCIATION

The National Education Association is an independent, voluntary organization of professional educators. It has over one million members, including teachers, supervisors, and administrators. As stated in the As-

sociation Charter, its purpose is "to elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States." Both the Association and its members have a deep interest in the quality of education received by the children of all races. For this reason, it has conducted investigations of the problems of race and education in the school systems of Wilcox County, Alabama, Baltimore, Maryland, Hyde County, North Carolina, and Detroit, Michigan. For this reason also, it has actively supported litigation in numerous school desegregation cases.

II.

SUMMARY OF THE ARGUMENT

Segregated education imposes enormous and irreparable injury on black children. *First*, there is the psychological damage to the black student, recognized by this Court in 1954, flowing from official maintenance of separate black schools. *Second*, it is established that black children, particularly in the South, are substantially less able to learn in an environment of racial isolation than in an integrated educational setting. *Third*, some school districts across the South still provide facilities for black students that are markedly inferior to those provided for whites, thus further reducing the quality of the education afforded black children.

The disastrous consequences of racial segregation in education have been established and accepted for many years, but the judicial attitude toward the question of speed of desegregation has often failed to consider that these consequences are accruing daily and cannot be reversed. A year's delay means that tens of thousands of black school children will endure another important

segment of their education in racial isolation; many of these children will complete their education during that period. It is time that the question of delay be put in these human terms. The National Education Association believes that neither administrative inconvenience, nor a general warning of "chaos, confusion, and a catastrophic educational setback" justified the delay granted in these cases. The administrative inconvenience in the immediate implementation of desegregation plans is, in the opinion of the Association, readily surmountable. Considerations of the quality of education call for speed, not for delay.

III.

ARGUMENT

A. Segregated Education Results in Enormous and Irreparable Injury to Black Children

In 1954, this Court recognized that the fact of officially-sponsored segregation, without more, causes serious psychological damage to children in elementary and secondary schools:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[1]

The isolation of black students from other children with varying backgrounds and aspirations is injurious in another respect. The United States Office of Education, in an official report based on a nationwide survey, found that "the achievement of minority group children increases" in proportion to the level of "the

[1] *Brown v. Board of Education*, 347 U. S. 483, 494, 1954.

educational aspirations and backgrounds of fellow students . . ."[2]

> It is those Negroes who are in the South whose achievement appears to vary most greatly with variations in the characteristics of their fellow students. Here, where the most educationally disadvantaged backgrounds are found, and where achievement is lowest, is where student body characteristics make most differences for Negro achievement. It is in these more stable, less urban areas where exposure to children of different educational backgrounds has in the past been least possible for Negro children.[3]

These findings are corroborated by the United States Commission on Civil Rights, which concluded that "the effects of racial composition of schools are cumulative. The longer Negro students are in desegregated schools, the better is their academic achievement. . . . Conversely, there is a growing deficit for Negroes who remain in racially isolated schools."[4]

A third major cause of educational harm to children attending all-black schools is the continued disparity in quality between black-attended and white-attended schools in the South. For example, the Commission on Civil Rights found that, in a sixteen-county area of Alabama, white-attended school buildings and their

[2] Office of Education, United States Department of Health, Education, and Welfare, *Equality of Educational Opportunity* (1966) at 302. In sec. 402 of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000c-1 (1964), Congress directed that this study be made.

[3] *Id.* at 304-05.

[4] *Racial Isolation in the Public Schools* (1967) at 204, Finding No. 9 on "Racial Isolation and the Outcomes of Education."

contents were worth an average of $981.00 per pupil. Those attended by blacks in the same area were worth only $283.00 per pupil. The National Education Association found similar disparities in its investigation of the Wilcox County, Alabama school system.

Transcript of Hearing held before the U. S. Commission on Civil Rights, Montgomery, Alabama, 1965, Exhibit No. 20 at 803.

At the hearing, the State Superintendent of Education spoke of a marked lack of interest in correcting these disparities:

Mr. Glickstein [for the Commission]: Dr. Stone, have you been moving ahead to bring about this equalization of [illegible] and consolidation and elimination of inadequate schools?

Dr. Stone [Alabama State Superintendent of Education]: We have been obeying the court order.

Mr. Glickstein: For example, Dr. Stone, our information indicates that five Negro schools each with an enrollment of less than 100 and one enrolling only 30 students continue to operate in Marengo County. Our information also indicates that in Wilcox County only one white school has an enrollment of less than 100 and that school has a valuation of $92,000. Eight of the other 11 Negro schools on the other hand have an assessed valuation of less than $20,000; six of these have a valuation of less than $10,000, and two actually have a valuation of $750.

[illegible]

Dr. Stone: I would assume that the building that is assessed for $120,000 is a more expensive building than the one that is assessed for $750, that would be a reasonable assumption. Now it is up to the State Board to do with the building of either one of the buildings. All the plans were promulgated by the local school system. It was little to oblige that we call democracy and we think that it has worked pretty well.

Transcript at 517-18, 530.

Commission on Professional Rights and Responsibilities, National Education Association, Wilcox County, Alabama: A Study of Social, Economic and Educational Deficiencies (1965).

The NEA unit established per pupil expenditures and expenditures per white attended and Black attended schools showing [illegible] and sometimes greater disparities in favor of white [illegible] 41, 42, 43, 44, 45, and 47.

The Office of Education survey established that the quality of the educational facility has a stronger effect on the achievement of disadvantaged students than it does on the achievement of students from more advantaged backgrounds. It also found that the quality of the facility was most important for Negroes in the South.

Since early 1967, almost every school district in the Fifth Circuit desegregating under court order has been ordered to equalize the facilities in its schools. *United States v. Jefferson County Board of Education*, 380 F. 2d 385 (5th Cir.) (*en banc*), *cert. denied*, 389 U.S. 840 (1967), but without discernible effect. In the opinion of the Association, the only practical procedure for the elimination of the qualitative differences in black and white schools is complete integration.

These three separate phenomena combine to produce irremediable educational harm. Thus, according to the Office of Education survey, in the rural South black students in the 12th grade are an average of 3.9 grades behind white students in reading comprehension.

B. The Considerations Relied Upon by the Government and the Court Below Do Not Justify Delay in Desegregation

The action of the court below, suspending its earlier mandate that terminal desegregation plans be implemented this Fall, was premised entirely on an August 19, 1969 letter written by the Secretary of the Depart-

Office of Education, United States Department of Health, Education and Welfare, *Equality of Educational Opportunity* (1966) at 22.

Id. at 274 ("In urban school systems in the South, black students in the twelfth grade were 3.9 grade levels behind whites in reading comprehension.")

ment of Health, Education and Welfare, seeking such a delay. In his letter, Secretary Finch asserted that the plans submitted by the Office of Education, pursuant to the July 3rd mandate of the Court of Appeals, were developed without adequate time and that this implementation "in the terribly short space of time remaining" presented "administrative and logistical difficulties" which could not be met without producing "chaos, confusion and catastrophe . . . ."[2]

No explanation of these conclusions was afforded by the Secretary. Moreover, they run directly counter to all previous expressions of the Executive Branch on the issue. In acceding to the requested delay, the Court of Appeals noted that the Government had proposed a more rigid timetable than that established by the court in its July 3, 1969 decision:

> Questions were specifically directed to the Assistant Attorney General appearing on behalf of the Government. Without qualification, in response to precise inquiries, he affirmed the Government's view that the timetable proposed by the Government was reasonable. And . . . he affirmed that sufficient resources of the Executive Department would be ready, available to enable the Office of Education of the United States Department of Health, Education and Welfare to fulfill its role as specified in the order proposed by it.

The court further noted that, until Secretary Finch's August 19 letter, there had been no suggestion that the

[2] The letter is not part of the record on the petition for certiorari in this case.

"United States v. Hinds County School Board . . . [p. 2]
[illegible] Nos. [illegible] and [illegible] Supp. [illegible] [illegible]

(c) the necessity to consider changes in curriculum;[16]

(d) the necessity to effect physical changes in classrooms, lavatories and other facilities;[17]

(e) the necessity to reassign some teachers;[18]

(f) the necessity to reconsider the expenditure of federal funds available under the Elementary and Secondary Education Act of 1965.[19]

The only additional points in justification for delay were references to the desirability of conditioning teachers, students and the community to the strains of school desegregation.[20]

The National Education Association does not believe that any of these reasons, or the combination of them, pose such educational or administrative problems as to justify further delay in desegregation. First, whatever may be the fact in large, complicated school systems, the asserted considerations have little relevance to small districts operating only a few schools. Yet very small systems[21] were lumped together with larger districts in the common assertions of difficulty.

Second, for even the largest systems involved here, the asserted difficulties are not sufficiently significant to justify delay.

[16] *Id.* at 64a-65a.
[17] *Id.* at 65a.
[18] *Id.*
[19] *Id.* at 67a.
[20] *Id.* at 65a, 67a.
[21] Among the cases at bar, the Anguilla Line Consolidated School District has only three schools, the Canton Municipal Separate School District has only four schools, and the Wilkinson County and the North Pike County Consolidated School Districts have only four schools apiece.

(a) Publicity for new school zone boundaries can be accomplished by a notice in a local newspaper and, to the extent necessary, by redirecting persons who report to the wrong school on opening day.

(b) Drawing up school bus routes in an integrated school system is far less complicated than the planning of school bus routes under a freedom-of-choice plan, and can normally be accomplished in a matter of days.

(c) The references to supposed changes of curriculum is unclear, but since neither the number of students at each grade level nor the number of teachers would necessarily change, the problem seems only that of allocating given numbers of students to given classes—a problem managed at the beginning of semesters by school systems across the country.

(d) The minor changes necessary to accommodate different ages of children than were formerly in a school building—installing desks, restroom facilities and water fountains of a different size—can be, and normally are, accomplished in a short period.

(e) The assignment of teachers to classes they are qualified to teach is a normal educational task, requiring but a few days to accomplish.

(f) Any change in the use of federal funds required by desegregation need not be resolved before school opening, and with the assistance of HEW officials, there is no reason why altering plans for the expenditure of Title I funds should present a burden of any size.

And the suggestion that the community, the teachers or the students need more time to become acclimated to desegregation is simply impermissible fifteen years after *Brown*.

The tasks referred to by the HEW witnesses should together require a week or, at most, two weeks to complete. Where a school district could not complete the necessary work in the available time,[22] the district court could have ordered a short delay in scheduled school opening. But there are no educational reasons—presented or existing—which would support a year's delay in effecting desegregation. Educators in the Office of Education concluded, after intensive investigations, that none of the districts here involved have sound reasons for delaying implementation of the plans submitted. There is nothing in this record to suggest that that conclusion was incorrect.

A further compelling reason for this Court to prohibit further delay in desegregation concerns the relationship of cases such as these, where compliance with constitutional requirements has not been achieved, to the many school districts in the South where school officials have eliminated the dual system. In many of the latter cases, compliance was possible in the face of substantial resistance in the community because of the assumption that the judicial and executive statements concerning the timetable for desegregation would be enforced. An abandonment of that timetable at this time seriously weakens the position of those who advocated the peaceful transition to a unitary system.

[22] As Secretary Finch's letter pointed out, some of the school districts involved did not begin their school year until September 11. Petition for certiorari at 53a

and threatens to precipitate resegregation in many of these districts.[23]

Implementation of the plans proposed in these cases by HEW during the course of this school year presents problems of disruption that would not have been presented had the Government not sought delay in August. On balance, however, the National Education Association believes that the adverse effects of the continued maintenance of segregated schools for any additional period outweighs the adverse effects of a change during the school year, and urges this Court to order the immediate implementation of the HEW plans.

IV.

CONCLUSION

Any further delay in desegregation would result in enormous and irreparable harm to black children. The educational and administrative reasons that have been advanced to justify a delay in desegration in the case at bar are without merit. Sound educational policy calls not for delay, but for terminal desegregation, even at the cost of reassigning students during the course of a school year.

Accordingly, amicus National Education Association urges that the August 28, 1969 order of the Court of Appeals be reversed, that this Court hold that administrative difficulties will no longer be permitted to postpone desegregation in any case, and that this matter be

[23] A report of the Department of Health, Education, and Welfare states that there were "29 last-minute reneges on plans" by school districts desegregating under HEW-approved voluntary plans, at the beginning of the 1969-70 school year. *Progress Report on Civil Rights* (1969) at 2.

remanded with instructions that the District Court enter orders requiring the immediate implementation of the plans drawn up by the Office of Education of HEW for these school districts.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 632

BEATRICE ALEXANDER, et als.,
Petitioners,

vs.

HOLMES COUNTY BOARD OF EDUCATION, et als.,
Respondents.

(INCLUDING CONSOLIDATED CASES)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING AND, IN THE ALTERNATIVE, CLARIFICATION OF MANDATE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 632

BEATRICE ALEXANDER, et als.,
Plaintiffs-Appellants-Petitioners,

vs.

HOLMES COUNTY BOARD OF EDUCATION, et als.,
Defendants-Appellees-Respondents.

JOAN ANDERSON, et als.,
Plaintiffs-Appellants-Petitioners,

UNITED STATES OF AMERICA,
Intervenor-Appellant-Respondent,

vs.

CANTON MUNICIPAL SCHOOL DISTRICT, et als., and
MADISON COUNTY SCHOOL DISTRICT, et als.,
Defendants-Appellees-Respondents.

ROY LEE HARRIS, et als.,
Plaintiffs-Appellants-Petitioners,

vs.

YAZOO COUNTY BOARD OF EDUCATION, et als.,
Defendants-Appellees-Respondents.

JOHN BARNHARDT, et als.,
Plaintiffs-Appellants-Petitioners,

vs.

MERIDIAN SEPARATE SCHOOL DISTRICT, et als.,
Defendants-Appellees-Respondents.

DIAN HUDSON, et als.,
Plaintiffs-Appellants-Petitioners,

UNITED STATES OF AMERICA,
Intervenor-Appellant-Respondent,

vs.

LEAKE COUNTY SCHOOL BOARD, et als.,
Defendants-Appellees-Respondents.

JEREMIAH BLACKWELL, JR., et als.,
Plaintiffs-Appellants-Petitioners,

vs.

ISSAQUENA COUNTY BOARD OF EDUCATION, et als.,
Defendants-Appellees-Respondents.

CHARLES KILLINGSWORTH, et als.,
Plaintiffs-Appellants-Petitioners,

vs.

ENTERPRISE CONSOLIDATED SCHOOL DISTRICT and
QUITMAN CONSOLIDATED SCHOOL DISTRICT,
Defendants-Appellees-Respondents.

UNITED STATES OF AMERICA,
Plaintiff-Appellant-Respondent,

GEORGE MAGEE, JR.,
Intervenor-Petitioner,

vs.

NORTH PIKE COUNTY CONSOLIDATED SCHOOL
DISTRICT, et als.,
Defendants-Appellees-Respondents.

UNITED STATES OF AMERICA,
Plaintiff-Appellant-Respondent,

GEORGE WILLIAMS, et als.,
Intervenors-Petitioners,

vs.

WILKINSON COUNTY SCHOOL DISTRICT, et als.,
Defendants-Appellees-Respondents.

PETITION FOR REHEARING AND, IN THE ALTERNATIVE, CLARIFICATION OF MANDATE

PRELIMINARY STATEMENT

In accordance with the provisions of Rule 58 of the Rules of this Court, the respondents filed this petition for rehearing and, in the alternative, for clarification of the Per Curiam mandate rendered in the above styled consolidated causes on October 29, 1969, state the grounds for such belief as hereinafter set forth.

I.

The Respondents Have Not Been Accorded Due Process of Law. There Has Been No Hearing on the Merits by Any Court nor Any Opportunity for the Litigants to Be Heard on the Merits Through Their Attorneys.

The nine cases consolidated for the purposes of the petition for writ of certiorari are a portion of the twenty-five cases consolidated under Docket Nos. 28,030 and 28,042 by the Court of Appeals for the Fifth Circuit. The opinion therein was rendered July 3, 1969, and appears as *U.S.A., et als.*, v. *Hinds County, et als.*, not yet reported. As was found in such opinion, all of these school districts had been operating for a number of years under a Jefferson type decree which provided a freedom of choice plan as authorized and delineated in *Jefferson II*. *U.S.A.* v. *Jefferson*, 380 F.2d 385.

The Per Curiam mandate dated October 29, 1969, after requiring that the school systems here involved

should not operate as dual school systems based on race but should "begin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color", provided as follows:

> The Court of Appeals *may in its discretion* direct the schools here involved to accept *all or any part* of the August 11, 1969, recommendations of the Department of Health, Education, and Welfare, *with any modifications which that court deems proper* insofar as those recommendations insure a totally unitary school system for all eligible pupils without regard to race or color.

The Court of Appeals for the Fifth Circuit has now acted under the circumstances hereinafter fully detailed. It has substituted for all of the Jefferson type decrees providing for freedom of choice and has rendered a decree, the nature of this decree will be hereinafter described. Attached to this decree are the thirty HEW plans filed on August 11, 1969. With the very minor exceptions detailed in the decree, these are put in full force and effect in every particular. The Court did not permit the alternate step procedure (referred to in many plans as "interim steps") to be utilized.

On October 29 the Per Curiam opinion of the Supreme Court was rendered. Copies thereof were received by attorneys for the defendants on or about Friday, October 31, and Saturday, November 1.

On Friday, October 31, the Court of Appeals issued its order directing all parties to all twenty-five suits to file with the Clerk of that Court on or before Wednesday, *November 5*, their recommended and proposed orders to effectuate and implement the opinion and decree of this Court. Such order was received by the attorneys for the parties in due course of the mails, a few being orally notified.

The order of the Court of Appeals issued on Friday, October 31, contained the following directions:

> Appellants, appellees and the United States of America as amicus or intervenor shall file with the Clerk of this Court on or before the fifth day of November, 1969, their recommended and proposed orders which will properly effectuate and implement the opinion and decree of the Supreme Court of the United States rendered on October 29, 1969, in the above named cases.

On Monday, November 3, attorneys for the defendants were advised by telephone and otherwise to be present in New Orleans before the Court of Appeals at 1:00 P.M. on Thursday, November 6, to attend a pre-order conference, and to have the superintendents of the school districts present at that time.

On Wednesday, November 5, the various districts filed their proposed orders embodying plans which had been very hastily prepared and revised over the week end, these being in the hands of the Court for from twenty-four to thirty-six hours prior to the "pre-order conference" held at 1:00 P.M. on Thursday, November 6. In the meanwhile, the attorneys for the private plaintiffs had sent to the Court copies of the several plans of desegregation filed by HEW on August 11. Hence a very few hours was consumed by the Court of Appeals in a comparison of these plans.

The oral notification to attorneys for the school districts to be present at the "pre-order conference" on November 6 included a statement that no arguments would be received on that date but there would only be a discussion of the order. The transcript of the proceedings on that date includes the following description of what occurred at the "pre-order conference":

(Page references are to the transcript.)

(p. 2) Ladies and gentlemen, we have called this pre-order conference today for the purpose of making some announcements and also to exchange views. After we make some statements, we want everyone to feel free to ask questions. *We don't intend to have any legal arguments, as such, but we do think it would be well for anyone that has questions, that you feel free to make such inquiries as you may have. . . .*

(p. 3) We have also studied the Supreme Court decision in these cases and we are of the view that action is required, and immediate action. . . .

(p. 5) We have prepared a draft order, it is not a final Order. We hope to put the Order out tomorrow. We did not want to put an order out until we had this conference and we want to tell you generally what is in the order now so that you will be advised as to *what questions you may wish to pose.*

(p. 6) Now, we are going on then, and we say to effectuate the conversion of these school systems to *unitary school systems within the context of the Supreme Court order* the following things have to be done, and then *generally* we are *putting into effect in every case*, except the ones I will tell you about, the recommended plan of the Office of Education, HEW. *And that is a permanent plan and not the interim plan.*

In accordance with the announcement and requirement of the Court, no argument was presented by any of the attorneys. No briefs on the merits were prepared within the three business days involved nor permitted to be filed by the Court. No hearing of any kind was had in the Court of Appeals at this or any other time, concerning the judgments proposed to be entered and the specific, clear, detailed, and revoluntionary provisions thereof, embodied therein through attachment of the plans filed by HEW on August 11.

Never in the history of jurisprudence in the United States has the fundamental concept of due process of law been so flagrantly violated. The following has occurred:

1. The original judgment of the Court of Appeals of July 3 set up a procedure whereby hearings would be had and due process of law completed.

2. The amendatory order of August 28, 1969, entered by the Court of Appeals also set up a procedure whereby hearings would be had and due process of law completed.

3. The mandate of the Supreme Court of October 29, 1969, provided:

> The Court of Appeals may make its determination and enter its order without further arguments or submissions.

4. The Court of Appeals having elected to prohibit all attorneys from presenting either briefs or oral arguments on the merits and not to consider any evidence before a Master or otherwise, due process of law was never accorded to either the United States as plaintiff or intervenor in twenty of these suits, nor to the school districts as defendants in twenty-five of these suits. (The Court of Appeals applied the mandate of this Court to all twenty-five consolidated cases.)

Every citizen of the United States is protected by the constitutional guarantee of due process of law. This is fundamental and has always been one of the basic concepts of our system of justice. One of the early statements of this fundamental constitutional right, which lives today for the protection of every citizen, was made by this Court through Justice White in *Hovey* v. *Elliott*, 167 U.S. 409, 42 L.Ed. 415, as follows:

> The fundamental conception of a court of justice is condemnation *only after hearing*. To say that courts

have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert *the court exercising such an authority into an instrument of wrong and oppression*, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends. . .

In *Galpin* v. *Page*, 85 U.S. ....., 18 Wall. 350 [21:959], the court said (p. 368 (963)):

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; *it is judicial usurpation and oppression, and can never be upheld where justice is justly administered.*"

Again, in *Ex parte Wall*, 107 U.S. 289 [27:562]; the court quoted with approval the observations as to "due process of law" made by Judge Cooley, in his Constitutional Limitations, at page 353, where he says:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College Case*, 17 U.S. ....., 4 Wheat. 518 [4:629]: 'By the law of the land is most clearly intended in the general law; *a law which hears before it condemns*, which proceeds upon inquiry and *renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.*' "

In *Morgan* v. *United States of America*, 304 U.S. 13, 82 L.Ed. 1129, this Court said through Chief Justice Charles Evans Hughes:

The right to a hearing embraces *not only the right to present evidence* but also a reasonable opportunity

> to know the claims of the opposing party and to meet them. *The right to submit argument implies that opportunity; otherwise the right may be but a barren one.*

Here, there has never been an opportunity for evidence to be introduced, there has been no opportunity whatsoever for the parties to be heard by their attorneys, in the District Court, in the Court of Appeals or in the Supreme Court of the United States as to any matter pertaining to the merits of the judgment which has been entered. The present judgment sets aside each judgment under which each of these school districts had been operating for a number of years, a judgment theretofore approved by the Court of Appeals of the Fifth Circuit in *Jefferson II*. It has destroyed in every district freedom of choice. It has required compulsory integration of every faculty and staff to the racial balance existing in the entire system. It will require compulsory assignment of students by use of pairing, racial zoning or direct assignment. In most instances this will also approach a racial balance and in every instance it is designed to and will very materially remove existing racial imbalance. This action falls squarely within the rules announced by this Court in *Powell* v. *Alabama*, 287 U.S. 45, 77 L.Ed. 158, in which this Court said:

> . . . The words of Webster, so often quoted, that by "the law of the land" is intended "a law which hears before it condemns," have been repeated in varying forms of expression in a multitude of decisions. In Holden v. Hardy, 169 U.S. 366, 389, 42 L.Ed. 780, 790, 18 S.Ct. 383, the necessity of due notice *and an opportunity of being heard is described as among the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."*

And Mr. Justice Field, in an earlier case, Galpin v Page, 18 Wall. 350, 368, 369, 21 L.Ed. 959, 963, 964,

> said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. *"Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."*

This Court is not now considering actions taken on or prior to July 3, 1969. *There has been no hearing on the merits upon any plan of desegregation embodied in the judgments entered on November 7.* Moreover, no court has permitted the plaintiff, the United States of America, or the defendants in these cases to be heard on the merits by brief or otherwise. Not one iota of testimony has been permitted before any court upon any portion of the judgments and plans now put into effect.

II.

The Judgment Now Entered by the Court of Appeals Conflicts with Decisions of the Courts of Appeal of Other Circuits.

The judgment entered here results in complete destruction of freedom of choice plans being based upon dicta first appearing in *Adams:*[1]

> If in a school district there are still all-Negro schools *or* only a small fraction of Negroes enrolled in white schools, *or* no substantial integration of faculties and school activities then, as a matter of law, the existing plan fails to meet constitutional standards as established in Green.

It appears that the entry of this judgment also arises from a misunderstanding of what constitutes a dual system

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1. *Adams* v. *Mathews*, 403 F.2d 181 (5th Cir. 1968).

of schools and a misunderstanding of the clause "a unitary nondiscriminatory school system".

Through a misconstruction of the "trilogy of cases", *Green*, *Monroe* and *Raney*, this panel of the Court of Appeals now finds itself in direct conflict with decisions of other circuits. The panel in *Adams* had before it a docket setting only. Yet, it seized upon numerous elements which were considered in combination and separated them, so that each separate element is now made the sine qua non of continuance of freedom of choice. This is also true in the varying definitions of what constitute the "vestiges of a dual school system" that must be removed.

The Court of Appeals of the Sixth Circuit determined on February 10, 1969, in *Goss v. Board of Education of Knoxville, Tennessee*, 406 F.2d 1183, that the elimination of all-Negro and all-white schools is not a condition precedent to either the establishment of a unitary, nonracial school system, or to the continuation of a freedom of choice plan of desegregation. In the Knoxville system there were five all-Negro schools and twenty-nine schools having faculties of only one race. It also found that in 1960 the district had "a school system completely and de jure segregated both as to students and faculty". In holding that the Knoxville school system was constitutionally acceptable, the Court of Appeals said:

> Preliminarily answering question I, it will be sufficient to say that *the fact that there are in Knoxville some schools which are attended exclusively or predominantly by Negroes does not by itself establish that the defendant Board of Education is violating the constitutional rights of the school children of Knoxville.* Deal v. Cincinnati Bd. of Education, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847, 88 S.Ct. 39, 19 L.Ed.2d 114 (1967); Mapp v. Bd. of Education, 373 F.2d 75, 78 (6th Cir. 1967). *Neither does the fact*

> *that the faculties of some of the schools are exclusively Negro prove, by itself, violation of Brown.*

The Court then discussed the rule set forth in *Green*, including in the statement that the school boards are "charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch". In applying this to the Knoxville District and discussing its effect, the Court of Appeals of the Sixth Circuit said:

> The Court further said that it would be their duty "to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437-438, 88 S.Ct. at 1694. We are not sure that we clearly understand the precise intendment of the phrase "a unitary system in which racial discrimination would be eliminated," *but express our belief that Knoxville has a unitary system designed to eliminate racial discrimination.*

The Court brushed aside the position that different constitutional principles should be applied to southern states where there had been in the past de jure segregation as contrasted to northern states where there had been in the past de facto segregation. This was of particular importance as *Deal* involved formerly de facto segregation and *Goss* involved formerly de jure segregation. The Court said:

> In Monroe v. Bd. of Commissioners, 380 F.2d 955, 958 (6th Cir. 1967), we expressed *our view that the end product of obedience to Brown I and II need not be different in the southern states, where there had been de jure segregation, from that in northern states in which de facto discrimination was a fortuity.* Our observations in that regard were not found invalid by the Supreme Court's opinion reversing our Monroe

decision. See Monroe v. Board of Commissioners, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968).

The constitutional principles thus found to be applicable to both southern states and northern states were stated by the Sixth Circuit in *Deal*, cited as supporting authority in *Goss*. *Deal* involved the Cincinnati school system in which de facto segregation had resulted in heavy racial imbalance in the schools.[2] Racial discrimination may be removed by different methods, including freedom of choice plans, validly set up, properly administered, with choices freely exercised without external pressures so that the plan itself (without regard to the statistical results produced by choices thereunder) is constitutionally acceptable. *Adams* and *Hinds County* are actually bottomed solely upon statistics and are in direct conflict with both *Goss* and *Deal*. In *Deal* the Sixth Circuit said:

> The cases recognize that the calculus of *equality is not limited to the single factor of "balanced schools"; rather, freedom of choice under the Fourteenth Amendment is a function of many variables* which may be manipulated differently to achieve the same result in different contexts. . . .
>
> *This is in accord with our holding that bare statistical imbalance alone is not forbidden.* There must also be present a quantum of *official discrimination* in order to invoke the protection of the Fourteenth Amendment. . . .

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2. The report of the Cincinnati school system to HEW for the school year 1968 revealed that of the 106 schools in the Cincinnati Public School System, forty were composed of students of one race (i.e., more than 99 per cent Negro or 99 per cent white students), of which thirteen schools were Negro and twenty-seven schools were white.

> Finally, in the one case in which *a district court apparently accepted the appellants' theory of racial imbalance*, Barksdale v. Springfield School Comm., 237 F.Supp. 543 (D.Mass. 1965), *the first Circuit, in vacating the decision* and dismissing the complaint without prejudice *specifically rejected any such asserted constitutional right*. Springfield School Comm. v. Barksdale, 348 F.2d 261, 264 (1st Cir. 1965).

Adams and its progeny, including *Hinds County*, are in direct conflict with *Springfield School Committee* v. *Barksdale*, 348 F.2d 361, rendered by the Court of Appeals of the First Circuit in 1965. The district court found that two of the elementary schools had over 80 percent Negro pupils, that fourteen elementary schools had no Negro pupils or less than one per cent Negro pupils, and that the school system was racially imbalanced. The Court of Appeals said:

> Having reached its conclusions, the court ordered the defendants to submit a plan to correct racial imbalance in the Springfield schools.

The Court vacated the order of the district court and reversed, stating the constitutional principles as follows:

> Certain statements in the opinion, notably that *"there must be no segregated schools,"* suggest an absolute right in the plaintiffs to have what the court found to be "tantamount to segregation" removed at all costs. *We can accept no such constitutional right.* Cf. Bell v. School City of Gary, 7 Cir., 1963, 324 F.2d 209, cert. den. 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216; Downs v. Board of Education, *10 Cir.*, 1945, 336 F.2d 988, cert. den. 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800. . . .
>
> But more fundamentally, when the goal is to equalize educational opportunity for all students, it would be no better to consider the Negro's special interests

exclusively than it would be to disregard them completely.

The hard and fast *Adams* rule, the statistically-based *Hinds County* decision, and like decisions conflict with *United States* v. *Cook County*, 404 F.2d 1125, 1135, decided by the Court of Appeals of the Seventh Circuit on December 17, 1968. The panels of this Circuit have brushed aside good faith. They require hard and fast statistical results *now*. To the contrary, the Court said in *Cook County*:

> *There is no hard and fast rule that tells at what point desegregation of a segregated district or school occurs.* The court in Northcross said the "minimal requirements for non-racial schools are geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right." 333 F.2d at 662. On the other hand, "*The law does not require a maximum of racial mixing or striking a rational balance accurately reflecting the racial composition of the community or the school population.*" United States v. Jefferson County Board, 372 F.2d 836, 847, n. 5 (5th Cir. 1966) aff'd en banc, 380 F.2d 385 (5th Cir.), cert. denied, Cado Parish School Board v. United States, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103 (1967).

By the entry of this judgment there arises a conflict with the opinion of the United States Court of Appeals for the Tenth Circuit in *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988 (1964), cert. denied 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800 (1965). This involved the public schools of the Kansas City, Kansas, school system, which was operated on a segregated basis prior to *Brown I*. Thereafter the schools were integrated based chiefly upon zones and neighbor-

hood school systems including the right of transfer. The Court held:

> There is, to be sure, *a racial imbalance* in the public schools of Kansas City. . . .
>
> *Appellants also contend that* even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, *the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention.* While there seems to be authority to support that contention, *the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them.* (Citing authorities).

See also *Mapp* v. *Board of Education of Chattanooga, Tennessee*, 373 F.2d 75, rendered by the United States Court of Appeals for the Sixth Circuit. This involved a school system in which de jure segregation continued until it was removed by a grade-to-grade extension of a freedom of choice plan resulting in "full integration of all grades in September 1966". In response to an attack upon the plan by the plaintiffs, the Court upheld the plan and said:

> To the extent that plaintiffs' contention is based on the assumption that the School Board is under a constitutional duty to balance the races in the school system in conformity with some mathematical formula, it is in conflict with our recent decision in Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966).

III.

The Constitutional Duty to Remove Vestiges of the Dual System of Public Schools Does Not Require the Entry of These Judgments.

The Court of Appeals has construed the Per Curiam order as either overruling or substantially modifying *Green, Raney* and *Monroe*. It has also construed such order to require entry of judgments resulting in compulsory integration of students and faculty and the elimination of all freedom of choice. Confusion has arisen from the various interpretations of the duty of school boards articulated in *Green*:

> School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly *charged with the affirmative duty* to take whatever steps might be necessary to *convert to a unitary system in which racial discrimination would be eliminated root and branch.* See Cooper v. Aaron, supra, at 7, 3 L.Ed.2d at 10; Bradley v. School Board, 382 U.S. 103, 15 L.Ed.2d 187, 86 S.Ct. 224; cf. Watson v. City of Memphis, 373 U.S. 526, 10 L.Ed.2d 529, 83 S.Ct. 1314. The constitutional rights of Negro school children articulated in Brown I permit no less than this: *and it was to this end that Brown II commanded school boards to bend their efforts.* . . . Note. "We bear in mind that the court has not merely the power but the duty to render a decree which will *so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.*" Louisiana v. United States, 380 U.S. 145, 154, 13 L.Ed. 2d 709, 715, 85 S.Ct. 817.

Although the passage of time now requires more realistic results and more comprehensive steps without further delay, the basic constitutional principles originally announced in *Brown I* have not been changed in the succeed-

ing pronouncements by the Supreme Court up to and including *Carr.*[3]

Monroe v. *Board of Commissioners of the City of Jackson, Tennessee*, 380 F.2d 955 (6th Cir.), involved a formerly racially segregated de jure school system. Because of its significance here and its direct conflict with these judgments, we quote from such decisions:

> Appellants argue that the courts must now, by reconsidering the implications of the Brown v. Board of Education decisions in 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), and upon their own evaluation of the commands of the Fourteenth Amendment, require school authorities to take affirmative steps to eradicate that racial imbalance in their schools which is the product of the residential pattern of the Negro and white neighborhoods. The District Judge's opinion discusses pertinent authorities and concludes that *the Fourteenth Amendment did not command compulsory integration of all of the schools regardless of an honestly composed unitary neighborhood system and a freedom of choice plan. We agree with his conclusion.* . . . He concluded "*We read Brown as prohibiting only enforced segregation.*" *369 F.2d at 60.* We are at once aware that we were there dealing with the Cincinnati schools which had been desegregated long before Brown, whereas *we consider here Tennessee schools desegregated only after and in obedience to Brown. We are not persuaded*, however, that we should devise a mathematical rule that will *impose a different and more stringent duty upon states which, prior to Brown, maintained a de jure biracial school system, than upon those in which the racial imbalance in its schools has come about from so-called de facto segregation*—this to be true even though the current problem be the same in each state.

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3. *Carr* v. *Montgomery County*, 23 L.Ed.2d 263.

> However ugly and evil the biracial school systems appear in contemporary thinking, they were, as *Jefferson*, supra, concedes, de jure and were once found lawful in Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), and such was the law for 58 years thereafter. *To apply a disparate rule because these early systems are now forbidden by Brown would be in the nature of imposing a judicial Bill of Attainder.* Such proscriptions are forbidden to the legislatures of the states and the nation—U.S. Const. Art. I, Section 9, Clause 3 and Section 10, Clause 1. *Neither, in our view, would such decrees comport with our current views of equal treatment before the law.*

A writ of certiorari was granted by the Supreme Court in this case and the decision appears as *Monroe*. The sole issue in that case was the constitutionality of a "free transfer" provision in the plan of desegregation. The same suit again came before the Court of Appeals of the Sixth Circuit on February 10, 1969, as *Goss*. The Court construed the holding of the Supreme Court in *Monroe* as follows:

> In Monroe v. Bd. of Commissioners, 380 F.2d 955, 159 (6th Cir. 1967), we expressed our view that the end product of obedience to Brown I and II *need not be different in the southern states, where there had been de jure segregation, from that in northern states in which de facto discrimination was a fortuity. Our observations in that regard were not found invalid by the Supreme Court's opinion reversing our Monroe decision.* See Monroe v. Board of Commissioners, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968).

When *Cooper* again reached the Court of Appeals of the Eighth Circuit the opinion was rendered as *Clark* v. *Board of Education of Little Rock School District*, 369 F.2d 661, rehearing denied, 374 F.2d 569. The Court delineated a school system and its operation which falls within the constitutional mandate of the Supreme Court as follows:

> *The Constitution prohibits* segregation of the races, the operation of a school system with dual attendance zones based upon race, and *assignment of students on the basis of race to particular schools.* If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to their classrooms. ***We find no unlawful discrimination in the giving of students a free choice of schools.***

The school system of Little Rock had been a dual segregated school system. Hence, the decisions of the Eighth Circuit in *Clark* as well as the decision in *Goss* (both considering formerly de jure segregated systems) are directly applicable to this judgment.

The rule applied in *Clark* to the Little Rock school system is certainly applicable to the thirty districts here:

> Though the Board has a positive duty to initiate a plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. . . . The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. It is true that statistics on actual integration may tend to prove that an otherwise constitutional system is not being constitutionally operated. However, these statistics certainly do not conclusively prove the unconstitutionality of the system itself. . . .
>
> *In short, the Constitution does not require a school system to force a mixing of the races in school* according to some predetermined mathematical formula. Therefore, the mere presence of statistics indicating absence of total integration does not render an otherwise proper plan unconstitutional.

The initial step to determine what are vestiges of a racially discriminatory dual school system (in which separation of the races has been de jure) as distinguished from racially nondiscriminatory unitary school systems (in which separation of the races has been de facto) is to eliminate those elements common to both.

Compilations before the Court of Appeals were assembled from the statistical information filed with the Department of Health, Education and Welfare and show the racial composition of schools in the one hundred largest school districts in this nation as of October 15, 1968. They were filed by school districts under the requirements of Title VI of the Civil Rights Act of 1964 and are upon Civil Rights Forms OS/CR 102-1 and OS/CR 101. Most of these districts have never had a dual system.

Assuming that a school with less than one percent of the minority race is an all-white or all-Negro school, of the 12,497 schools in the one hundred largest school districts in the United States 6,137 schools are either all-white or all-Negro. Thus, more than forty-eight percent of the schools in these districts are either all-white or all-Negro. It is also found that in districts having as much as twenty percent or more Negro student enrollment, only one district does not have within it all-Negro schools. This is the Rochester, New York, Monroe County School District. In the consolidated cases at bar only one of the thirty districts has less than twenty percent Negro student enrollment. These facts cannot be a "vestige of the dual system of schools" but resulted from the natural process of education in a unitary, non-racial school system:

District	Total Schools in Dist.	Schools with Faculty of One Race	Schools of One Race	All-Negro Schools
Chicago Public Schools, Chicago, Ill.	610	236	392	208
Indianapolis Public Schs., Indiana	119	1	52	17
Des Moines Community Schs., Iowa	81	52	36	—
Boston School Dept., Massachusetts	196	108	56	11
Detroit Public Schools, Michigan	302	10	98	67
Special School Dist. No. 1, Minneapolis, Minn.	98	52	42	—
St. Louis City Sch. Dist., Mo.	164	81	114	83
Kansas City School Dist., Mo.	99	14	43	19
Newark Public Schools Newark, N. J.	80	1	27	27
Oklahoma City Public Sch. Dist., I-89, Okla.	115	5	71	15
Dallas Indep. Sch. Dist., Texas	173	149	117	26
Los Angeles School Dist., Calif.	591	229	359	65
Sch. Dist. No. 1, City & Co. of Denver, Colo.	116	32	54	3
District of Columbia Public Schools	188	26	114	114
Gary Community Schools, Gary, Ind.	45	6	25	21
Cleveland, Ohio, Cuyahoga Co.	180	38	115	57

New York City Public Schs. N.Y., N.Y.	853	221	158	113
Houston Indep. Schools, Houston, Texas	225	9	139	61
School Dist. of Philadelphia, Pa.	278	3	37	63

Broussard[4] approved the Houston Independent School District as being in compliance with constitutional requirements under a freedom of choice plan. According to its official report as of October 15, 1968, there then remained sixty-one all-Negro schools, seventy-eight all-white schools, and there were eighty-six desegregated schools.

It is clear that the following do not constitute vestiges of a de jure racially discriminatory dual school system:

(1) All-Negro schools and all-white schools, identifiable as being attended by students of only one race or by students predominantly of one race.

(2) Schools being served by faculty and staff composed of members of one race or composed predominantly of members of one race.

(3) Schools in which the number of students of the two races do not materially vary from year to year, i.e., in which statistics do not demonstrate that the number of Negro students is increasing in a school attended predominantly by white students or in which Negro teachers are not increasing where the faculty is composed predominantly of members of the white race.

We respectfully submit that the entry of these judgments was the result of a misconstruction of the Per Curiam order dated October 29, 1969. It is clear that the Court of Appeals believed it had been expressly directed

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4. *Broussard* v. *Houston Ind. School District*, 395 F.2d 817

to enter the judgments now in effect. A clarification of the mandate removing this belief would permit the Court of Appeals to enter judgments in accordance with *Green*, *Monroe*, *Raney* and *Carr* and other applicable decisions of this court. The entry of proper judgments within the scope of such decisions and what we believe to be the meaning of the Per Curiam order would remove the above conflicts with other Circuits.

IV.

The HEW Plans, with the Inclusion of the Alternative or "Interim" Steps in Student and Faculty Integration, Would Put into Immediate Effect Unitary Racially Non-Discriminatory School Systems.

The HEW plans of August 11, 1969 all included a two-step procedure. As to students, the first step (in most of the plans called an "interim" step) will result in substantial integration of students and faculty. These alternative or initial steps modify the freedom of choice plans in various ways including pairing of grades, closing of schools, zoning to bring about fixed student attendance patterns, etc. They generally required faculty integration to the extent of one-half of the ultimate requirement.

When the Per Curiam opinion is construed in the context of previous decisions of this Court its description of a unitary school system is clear. The mandate would require the Court of Appeals to enter an order as to the school districts:

> . . . directing that they begin immediately to operate as unitary school systems within *which no person should have to be effectively excluded from any school because of race or color.*

The key is the removal of all discrimination, in compulsory and complete integration attained by various forms of mandatory asignment of students.

It does not seem to have been generally recognized that the Supreme Court of the United States in *Green, Raney, Monroe* and *Carr* not only failed to place its stamp of approval upon *Jefferson II*, but *affirmatively declined to hold that the Fourteenth Amendment requires compulsory integration in public schools.* These cases clearly and unmistakably describe the school system which meets all constitutional guarantees.

The key is complete and immediate removal of racial discrimination, and not complete compulsory integration of students through mandatory assignment of students by various means.

In *Green* such system is described as: "*A racially nondiscriminatory school system*"—"a unitary, nonracial system of public education"—"a unitary system in which racial discrimination would be eliminated root and branch."

In *Raney* such system is described as: "*A unitary, nonracial school system*".

In *Monroe* such school system is described as: "A racially non-discriminatory system"—"*a unitary system in which racial discrimination would be eliminated root and branch*"—"a system without a 'white' school and a 'Negro' school, just schools".

In *Carr* such school system is described as: "*A system of public education free of racial discrimination*"—"a completely unified unitary nondiscriminatory school system"—"a racially nondiscriminatory school system".

The Supreme Court affirmatively declined to hold in *Green* that the Fourteenth Amendment requires "compulsory integration", saying:

> The Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only *by reading the Fourteenth Amendment as universally requiring "compulsory integration"*, a reading it insists the wording of the Amendment will not support. *But that argument ignores the thrust of Brown II.* In the light of the command of that case, *what is involved here is the question whether the Board has achieved the "racially non-discriminatory school system" Brown II held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system.*

The *Adams* dicta upon which these judgments are based arose through the consideration of one paragraph, one sentence or even a portion of one sentence in *Green*, *Raney*, or *Monroe*. A study of these opinions as a whole (supplemented by *Carr*) reveal the fallacy of the reasoning upon which the *Adams* dicta was based. The panels of this Court have failed to follow the teachings of these cases. It is only by a consideration of the many complex factors entering into the educational process and particularly into the desegregation of a formerly de jure and formerly de facto segregated schools, that we are able to chart the course which is in the best interest of the students *and* of our public schools. This was the objective stated by Mr. Justice Black in *Carr*.

In *Green* the Supreme Court found that the school system of New Kent County was a dual school system and described such system as follows:

> . . . *Racial identification of the system's schools was complete*, extending not just to the composition of student bodies at the two schools but *to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.*

In *Green*, *Raney* and *Monroe* there was considered many of the factors which, *when taken as a whole and in combination*, should be utilized in determining the application of the following test:

> Where the Court finds the board to be acting in good faith and the proposed plan to have real prospects of dismantling the state-imposed dual system "at the *earliest practicable date*" then the plan may be said to provide effective relief. . . . Moreover, whatever plan is adopted will require evaluation in practice. . . . The elements elucidated in these cases included:
>
> 1. Every facet of school operations;
> 2. Faculty, staff and student body;
> 3. Transportation and construction of new buildings;
> 4. Extracurricular activities and facilities;
> 5. Majority to minority transfer;
> 6. Method of exercising the freedom of choice;
> 7. Assignment of students who did not exercise the freedom of choice;
> 8. Whether or not the "public school facilities for Negro pupils (were) inferior to those provided for white pupils";
> 9. Operation of the freedom of choice plan "in a constitutionally permissible fashion";
> 10. "All aspects of school life including faculties and staffs";
> 11. Whether "the board had indeed administered the plan in a discriminatory fashion";
> 12. The comparative treatment of students attempting "to transfer from their all-Negro zone schools to schools where white students were in the majority";

13. The comparative treatment of "white students seeking transfers from Negro schools to white schools";

14. Whether "the transfer (provision) lends itself to perpetuation of segregation".

Within the broad statements of *Green* fall the following additional phases of a school system:

15. Athletic activities within the schools;

16. Parent-teacher associations;

17. Faculty and staff meetings within schools and of faculties and staffs of the various schools at the elementary, junior high school and high school levels;

18. School-sponsored visitation of student body officers and student committees;

19. In-service training of teachers and staff to assist in the desegregation process;

20. Participation by students in various types of student organizations.

Yet under the *Adams* dicta, upon which this judgment is based (thereafter quoted by several panels) any one of the following factors standing alone will outlaw freedom of choice and require compulsory integration by mandatory student assignment (racial zoning or racial individual assignments).

If there is an all-Negro school in the district freedom of choice is "impermissible"; or

If "only a small fraction of Negroes [have] enrolled in white schools" freedom of choice is impermissible; or

If "no substantial integration of faculties and school activities" has been attained, freedom of choice is impermissible.

On April 18, 1968, it was held in *United States* v. *Board of Ed. Polk County*, 395 F.2d 66, 69:

> The record here discloses *what the courts have previously commented on*, that is *it is rare, almost to the point of nonexistent, that a white child, under a freedom of choice plan, elects to attend a "predominantly Negro" school.* As this court said in the first *Jefferson* case:
>
> > "In this circuit white students rarely choose to attend schools identified as Negro schools. . . ."

Yet on August 20, 1968, only four months later, the *Adams* dicta outlawed any freedom of choice plan "if in a school district there are still all-Negro schools".

Again on September 24, 1968, in *Graves* the panel said:

> In its opinion of August 20, 1968, this Court noted that, under *Green* (and other cases), *a plan that provides for an all-Negro school is unconstitutional.*

Judge Bell sounded a warning in *Jefferson IV* which is accentuated by the decision in these twenty-five consolidated cases. The deviation from accepted constitutional principles and the destructive effect upon the desegregation process is increasing with every decision by a panel of this Court. On July 1 of this year, Judge Bell said in *Jefferson IV*:

> I concur in the opinion and the result thereof *except to the extent, if any, that the decisions of this court cited therein may exceed the requirements laid down by the Supreme Court* in *Green* v. *County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968); *Raney* v. *Board of Education of Gould, Arkansas*, 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee*, 391 U.S. 450 (1968), to-wit: that the dual school systems be disestab-

> lished. I am in fundamental disagreement with the approach of an appellate court stipulating the details of transition plans where couched in terms of constantly escalating interim demands. *The specter of escalation, with no end in sight, retards the disestablishment process.*
>
> Congress has never acted as it could have under Section 5 of the Fourteenth Amendment to set uniform standards for disestablishing dual school systems. Meanwhile, no court has defined "disestablishment". My view continues to be that school systems are entitled to know the ultimate standard. *United States* v. *Jefferson County Board of Education*, 5 Cir., 1967, 380 F.2d 385, dissenting opinion at p. 413.

It is clear that when the HEW plans are put into effect as terminal plans, including the alternate or "interim steps" in student and faculty integration, these plans will be operated as unitary non-racial non-discriminatory unitary school systems, unless the Court holds that every single element mentioned in *Green*, *Raney* and *Monroe* is a separate sine qua non of such system.

We respectfully submit that even if the most extreme interpretation were correct, alternate or "interim steps" are permitted. There is little difference betwen the word "immediately" used in the Per Curiam order of October 29 and the word "now" as was said in this connection by Judge Bell at the Pre-Order hearing (Tr. p. 6):

> Now, that is the language of the Supreme Court decision. It is a little different from some of the language used in the other Supreme Court decisions but probably means the same thing.

We attach as "Exhibit A" hereto, several typical illustrations of "composite building information" contained in the HEW plans showing the ultimate effect thereof without using the interim or alternate steps. It will be noted

that the student integration is substantially to a racial balance.

All of the 25 judgments entered in these cases (through attachment of detailed plans made a part of the general judgment) contain the ultimate mandatory provision that "principals, teacher-aides and other staff" shall be assigned:

> . . . that the ratio of negro to white teachers in each school, and the ratio of other staff each are substantially the same as each such ratio is to teachers and other staff, respectively in the entire school system.

The initial or alternative step in these judgments required a ratio balance to the extent of 50% of the ultimate goal. When the Court of Appeals put into effect the ultimate goal it has resulted in judgments violating the teaching of *Carr*.

COMPOSITE BUILDING INFORMATION FORM

ON B: PROJECTED ENROLLMENT 1969-70 · FRANKLIN COUNTY SCHOOLS

Name of School	Grades	Capacity Perm.	Capacity W. Ports.	Students W	Students N	Students T	Staff W	Staff N	Staff T	Comments
FRANKLIN	7-12.	1380	—	546	512	1058				
LILLIE MAE BRYANT	1-6	1350	—	537	560	1097				
TOTAL				1083	1072	2155				
JOHNS SPECIAL RETARDED	UNGRADED			11	3	14				
GRAND TOTAL				1094	1075	2169				

Exhibit A

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COMPOSITE BUILDING INFORMATION FORM

DATE: Projected 1969-70 — Hobbs Elementary

Name of School	Grades	Capacity Perm.	Capacity P. Ports.	Students W	Students N	Students T	Staff W	Staff N	Staff T	Comments
Hobbs Elem.	1-5	300	240	440	420	860	15	15	30	Permt.
Emerson	1-5	450		390	370	760	17	19	36	
		750	240	830	790	1620	32	34	66	

DATE: Projected 1969-70 — Lake County

Name of School	Grades	Capacity Perm.	Capacity P. Ports.	Students W	Students N	Students T	Staff W	Staff N	Staff T	Comments
Lea	1-8			162	120	282				
South Lake	9-12			165	208	373				
Murphy	1-8			218	395	663				
Carver	1-12			200	400	600				
Stribling	1-12			250	150	400				
Coffman	1-8			536	757	1293				2 portables from Murphy
Jordan	9-12			307	394	701				
				2058	2324	4312				

SCHOOL SYSTEM INFORMATION FORM

DATE: PROJECTED 1969-70 LAUDERDALE COUNTY

Name of School	Grades	Capacity Perm.	Capacity W. Ports.	Students W	Students N	Students T	Staff W	Staff N	Staff T	Comments
SOUTH POINT	1-8	570	570	532	430	962				2 6th 3 portables
MAGEE EAST	1-8	1050	1050	420	500	920				6th 2 Portables
WEST	1-8	1050	1050	457	480	937				
COLLINSVILLE	1-8	750	750	332	116	448				
MIDDLETON	9-12	1350	1350	845	1192	1116				Portable 3

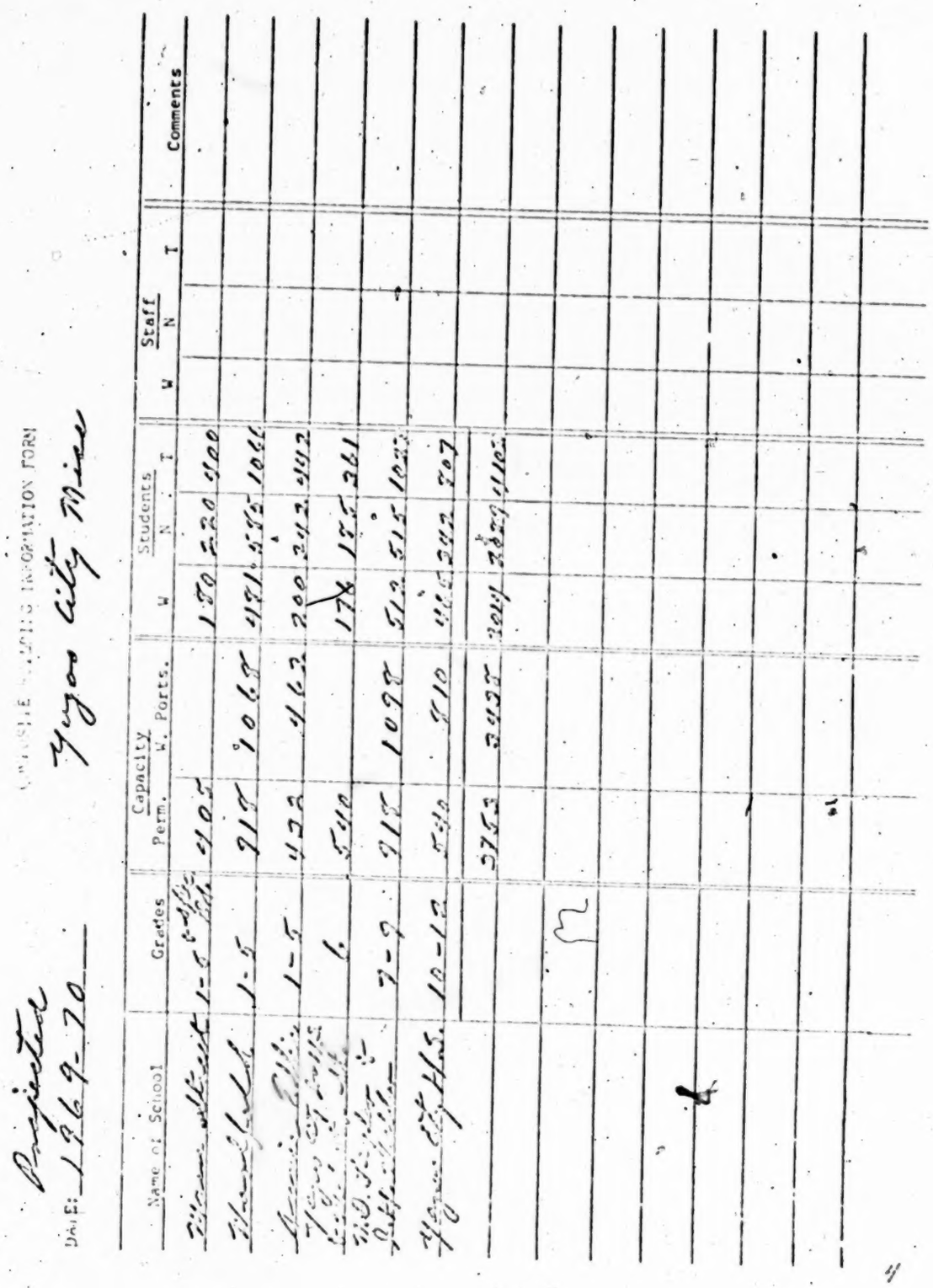
3059 1062 4851

* Separate figures on 1968-69 not available

SCHOOL SYSTEM INFORMATION FORM

DATE: Projected 1969-70 Lincoln County

Name of School	Grades	Capacity Perm.	Capacity W. Ports.	Students W	Students N	Students T	Staff W	Staff N	Staff T	Comments
Eva Harris High	10-12	540	660	350	206	556				4 aux. in Dry Creek
Loyd Starr Jr. High	4-9	425		209	165	374				
Progress Elem.	1-3	210		108	99	207				
West Lincoln	1-9	455		222	132	354				
Bogue Chitto	3-9	780		390	231	621				
Lincoln Co. Training	1-2	210		172	50	222				
Enterprise	1-9	360		220	135	355				
TOTAL				1671	1618	2689				



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The result of the alternate or interim steps is the equivalent of pairing of three out of seven schools in Leake County; pairing of grades one through six in Franklin County; pairing of four out of seven schools in Lincoln County; pairing of seven out of twelve grades in the Holly Bluff District; pairing of students in three out of seven school buildings in the Yazoo City District and equivalent effect in Lauderdale County. As thus modified, freedom of choice would remain until September 1970 when the ultimate steps would be taken.

CONCLUSION

We respectfully submit that a rehearing should be granted in this matter or at least that the mandate be amended so as to clarify the discretion vested in the Court of Appeals and to also make it clear that complete integration of students and faculty comparable to the racial composition of the school system is not required.

We hereby certify as attorneys of record for the Respondents that this Petition for Rehearing is presented in good faith and not for delay.

Respectfully submitted,

JOHN C. SATTERFIELD

and

JUDGE A. F. SUMMER

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Rehearing were served on the opposing counsel on this 21st day of November, 1969, by mailing copies of same, postage prepaid, at the last known address as follows:

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JOHN C. SATTERFIELD

JUDGE A. F. SUMMER

ALEXANDER ET AL. *v.* HOLMES COUNTY BOARD OF EDUCATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 632. Argued October 23, 1969—Decided October 29, 1969

Continued operation of racially segregated schools under the standard of "all deliberate speed" is no longer constitutionally permissible. School districts must immediately terminate dual school systems based on race and operate only unitary school systems. The Court of Appeals' order of August 28, 1969, delaying that court's earlier mandate for desegregation in certain Mississippi school districts is therefore vacated and that court is directed to enter an order, effective immediately, that the schools in those districts be operated on a unitary basis. While the schools are being thus operated, the District Court may consider any amendments of the order which may be proposed, but such amendments may become effective only with the Court of Appeals' approval.

Vacated and remanded.

Jack Greenberg argued the cause for petitioners. With him on the brief were *James M. Nabrit III*, *Norman C. Amaker*, *Melvyn Zarr*, and *Charles L. Black, Jr.*

Assistant Attorney General Leonard argued the cause for the United States. With him on the memorandum was *Solicitor General Griswold*. *A. F. Summer*, Attorney General of Mississippi, and *John C. Satterfield* argued the cause and filed a brief for respondents other than the United States.

Louis F. Oberdorfer argued the cause for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* urging reversal. With him on the brief were *John W. Douglas*, *Bethuel M. Webster*, *Cyrus R. Vance*, *Asa Sokolow*, *John Schafer*, *John Doar*, *Richard C. Dinkelspiel*, *Arthur H. Dean*, *Lloyd N. Cutler*, *Bruce Bromley*, *Bert I. Bernhard*, *Timothy B. Dyk*, and *Michael R. Klein*.

Richard B. Sobol and *David Rubin* filed a brief for the National Education Association as *amicus curiae* urging reversal. The Tennessee Federation for Constitutional Government filed a brief as *amicus curiae*.

PER CURIAM.

This case comes to the Court on a petition for certiorari to the Court of Appeals for the Fifth Circuit. The petition was granted on October 9, 1969, and the case set down for early argument. The question presented is one of paramount importance, involving as it does the denial of fundamental rights to many thousands of school children, who are presently attending Mississippi schools under segregated conditions contrary to the applicable decisions of this Court. Against this background the Court of Appeals should have denied all motions for additional time because continued operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. *Griffin* v. *School Board*, 377 U. S. 218, 234 (1964); *Green* v. *County School Board of New Kent County*, 391 U. S. 430, 438–439, 442 (1968). Accordingly,

It is hereby adjudged, ordered, and decreed:

1. The Court of Appeals' order of August 28, 1969, is vacated, and the case is remanded to that court to issue its decree and order, effective immediately, declaring that each of the school districts here involved may no longer operate a dual school system based on race or color, and directing that they begin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color.

2. The Court of Appeals may in its discretion direct the schools here involved to accept all or any part of the August 11, 1969, recommendations of the Department of Health, Education, and Welfare, with any modifications which that court deems proper insofar as those recommendations insure a totally unitary school system for all eligible pupils without regard to race or color.

The Court of Appeals may make its determination and enter its order without further arguments or submissions.

3. While each of these school systems is being operated as a unitary system under the order of the Court of Appeals, the District Court may hear and consider objections thereto or proposed amendments thereof, provided, however, that the Court of Appeals' order shall be complied with in all respects while the District Court considers such objections or amendments, if any are made. No amendment shall become effective before being passed upon by the Court of Appeals.

4. The Court of Appeals shall retain jurisdiction to insure prompt and faithful compliance with its order, and may modify or amend the same as may be deemed necessary or desirable for the operation of a unitary school system.

5. The order of the Court of Appeals dated August 28, 1969, having been vacated and the case remanded for proceedings in conformity with this order, the judgment shall issue forthwith and the Court of Appeals is requested to give priority to the execution of this judgment as far as possible and necessary.